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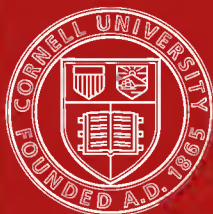
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# THE HIGHWAY CODE

OF THE

STATE OF NEW YORK

CONTAINING

The Highway Law of 1908, as Revised by the Joint Committee of the Senate and Assembly to Investigate the Subject of Highways; the Motor Vehicle Law of 1904, and all other Constitutional and Statutory Provisions Relating to Highways and Bridges

WITH

EXPLANATORY NOTES, NOTES OF CASES AND FORMS

By **FRANK B. GILBERT**

Editor of Gilbert's Town and County Officers' Manual

In Collaboration with Hon. J. P. Allds, Chairman of said Joint Committee

SUPPLEMENTED BY

Practical Suggestions and Directions to Highway Officers, Relating to the Construction, Improvement, Repair and Maintenance of Highways and Bridges

By **FRANK D. LYON**

Former State Special Examiner of Highways

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ALBANY

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## P R E F A C E

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The Highway Law of 1908 marks a new era in the development of the highway system of the State of New York. It is a revision and codification of all general laws pertaining to the construction and maintenance of highways and bridges, and the raising and expenditure of state, county and town moneys therefor, and in any way relating to the use of and the rights of the public on such highways and bridges, and the powers and duties of state, county and town officers in respect thereto. But it does more than revise and codify existing laws; it originates new methods of state and county administration of highway affairs; it logically and effectively unites centralization with local control and responsibility, on the one hand, by creating a state commission with full power to aid, supervise and direct the local officer in administering highway affairs in his locality, and on the other, by preserving to the local officer' all his power and responsibility in respect to local conditions and the expenditure of town and county funds; it outlines a comprehensive system of trunk highways and provides for their construction at the sole expense of the state; it abolishes the time-worn and ineffective labor system of taxation for the maintenance of town highways and substitutes therefor a money tax to be levied by the board of supervisors upon estimates duly submitted by the town superintendent of highways and revised by the town board, subject to reasonable limitations as to amounts which may be raised without a vote of a town meeting; it provides for the proper audit of town expenditures for highways and bridges and the systematic and uniform accounting for receipts and expenditures by highway officers, under the supervision of and in the form prescribed by the state commission of highways; it has more fully protected the interests of county and town in the construction of county highways and has provided more effectual safeguards in the award of contracts for the construction of state and county highways. These are only a few of the changes made by this important act. No other legislature has attempted such comprehensive modification of existing highway conditions. Many of the changes included in this act are already in effect, especially those

pertaining to the levy and collection of highway taxes. It becomes essential, therefore, that local highway officers should immediately inform themselves as to the steps required to be taken prior to November 1, 1908, the commencement of the ensuing highway year.

In preparing this work the editor has availed himself of the material accumulated by the Joint Committee on Highways, appointed pursuant to resolution of the Legislature of 1907, which had in charge the drafting of the law. The explanatory notes are based largely upon data procured by this committee. Senator J. P. Allds, who was the chairman of this committee, has given freely of his time in examining, revising and frequently rewriting the copious explanatory notes to the several sections of the law. Credit must be given to him for whatever merit may be found in this part of the work.

An attempt has been made to collect and apply all cases construing provisions of former highway laws, in connection with the provisions of the new law which pertain to the same subject-matter. Mr. John T. Fitzpatrick of the Legislative Reference Section of the State Library has been of great assistance in collecting, examining and digesting these cases.

Part Two of the book was written by Frank D. Lyon, former State Special Examiner of Highways. It contains a synopsis of the law, so far as it affects town and county officers, with practical suggestions as to the performance of official duties by highway officers, and the construction, improvement, repair and maintenance of highways.

FRANK B. GILBERT.

ALBANY, N. Y., *August 1, 1908.*

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# THE HIGHWAY CODE

OF THE

STATE OF NEW YORK.

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## CHAPTER I

### The Highway Law.

L. 1908, chap. 330. "An act in relation to highways and bridges, constituting a consolidation of the highway laws, and providing for a state department of highways and for the construction and maintenance of state and county highways."\*

- Article
- I. Short title and definitions (§§ 1-3).
  - II. Department of highways (§§ 10-22).
  - III. District or county superintendents (§§ 30-33).
  - IV. Town superintendents; general powers and duties (§§ 40-70).
  - V. Highway moneys; state aid (§§ 90-111).
  - VI. State and county highways (§§ 120-157).
  - VII. Maintenance of state and county highways (§§ 170-179).
  - VIII. Laying out, altering and discontinuing highways; private roads (§§ 190-240).
  - IX. Bridges (§§ 250-262).
  - X. Ferries (§§ 270-274).
  - XI. Miscellaneous provisions (§§ 280-303).
  - XII. Saving clauses; laws repealed; when to take effect (§§ 310-318).

## ARTICLE I.

### Short Title and Definitions.

- Section 1. Short title.
- 2. Definitions.
  - 3. Classification of highways.

Section 1. Short title.— This chapter shall be known as the "Highway Law."

Scope of law. The Highway Law as herein constituted is intended to contain all the provisions of law in relation to the powers and duties of State,

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\* Sections 43, 90, 91, 94, 95, 99, 100, 130, 131, 179, 280, 315 and 317 of this act took effect May 19, 1908; the remainder of the act takes effect January 1, 1909.

county and town officers charged with the construction, improvement, care and superintendence of highways and bridges, maintenance and repair of such highways and bridges, the regulation of ferries and the laying out, alteration and discontinuance of highways, the rights of parties in respect to private roads, and all other provisions pertaining to or affecting general highways and bridges outside of incorporated villages and cities. The law does not include the use of highways by automobiles for the reason that provisions relating thereto are contained in the Motor Vehicle Law. (See chap. VII, *post.*) Except as to motor vehicles, the Highway Law contains all statutes of a general nature pertaining to State, county and town highways and bridges.

**Historical statement.** Highways and the matters relating thereto have always been prolific subjects of legislation. At the outset of the existence of New York as a colony, the question of affording facilities of transportation and communication attracted the attention of our legislative bodies. The springing up of settlements here and there throughout the colony made necessary the construction of intercommunicating highways, and legislation became necessary to accomplish the desired purpose by providing for methods of construction and means of paying the cost thereof. There are many instances of regulation of the construction, maintenance and repair of highways among the colonial acts. A number of these are special in their nature, relating to particular localities. There seems, however, to have been no effort to provide a general scheme of highway administration during the colonial period. The peculiar circumstances of this period and of the earlier years of the State's history demanded the grant of franchises to corporations for the construction and maintenance of toll rates and bridges.

The first comprehensive law on the subject of highways was passed in 1797, chap. 43, which regulated highways in all the counties of the State except those of New York, Suffolk, Queens and Kings. And then again we find the laws upon this subject revised and re-enacted by L. 1801, chap. 186, in the Revised Laws of 1813, chap. 33, and in the Revised Statutes of 1828, title 1, chap. 18, pt. 1.

The next effort to consolidate and re-enact the laws upon this subject was made by the Statutory Revision Commission in 1890, and the Legislature enacted the Highway Law of 1890 (chap. 568). This act consolidated and revised previous legislation upon the subject; but it was more than a consolidation, in that new provisions were engrafted on the antecedent law for the purpose of improving the highway system. *People ex rel. Root v. Board of Supervisors*, 146 N. Y. 107, 112 (1895). At the time of its enactment it purported to contain all the laws relating exclusively to highways and bridges and the powers and duties of town officers relating thereto. A careful examination of the statutes existing at that time will clearly indicate that all live laws in existence at that time were considered and disposed of by that commission.

**New Highway Law.** No period in the history of this State has witnessed as many changes in methods of highway construction, improvement and maintenance as that between 1890 and the present time. When the Highway Law of 1890 took effect there were but very few towns which had availed themselves of the privilege of improving and repairing highways under the so-called money system. The labor system was almost universally

employed, although since 1873, chap. 395, the several towns in the State were given the option of changing to a money system, by which an annual tax was levied instead of an assessment for labor, and the money so raised was expended in procuring the work to be done by contract or day's labor.

The futility of the labor system of working the highways as a means of securing properly maintained roads has now come to be universally recognized. This change in opinion has doubtless been influenced by the policy of the State in contributing to the expense of highway maintenance wherever a town votes in favor of the money system. This policy was first recognized by the so-called Fuller Act in 1898, chap 351, in which it was provided that the State should pay to each town adopting the money system an amount equal to 25 per cent. of the amount raised for highway purposes. This amount was subsequently increased to 50 per cent. by the so-called Plank Act, L. 1902, chap. 156. By the amendments of 1907 this State aid was further increased so that in towns having an assessed valuation of less than one million dollars, the State has contributed an amount equal to the amount raised by the towns, and in other towns the contribution varies from 50 per cent. to 90 per cent. of the amount raised by the town, according to the assessed valuation. See § 101, *post*.

Upon the adoption of this policy of State aid, the Legislature deemed it advisable to provide for a certain degree of State supervision over the expenditure of State money by town officers. The towns were restricted in their expenditure of money to the repair and permanent improvement of highways; supervisors were required to give bonds for the faithful disbursement, safe-keeping and accounting for the moneys coming into their hands; the State Engineer was authorized to make rules and regulations for the repair and maintenance of town highways (former Highway Law, § 55-c, as added by L. 1904, chap. 609), and could force compliance therewith by withholding State money in case of noncompliance; and subsequently all towns receiving State aid were required to report to the State Engineer all matters pertaining to the highways therein (L. 1906, chap. 363; L. 1907, chap. 719).

At the time of the enactment of the present law about 720 of the 934 towns had adopted the money system of working the highways, and were subject to the special provisions of the Highway Law, relative to the construction, improvement and repair of highways by money raised by tax in the towns and received from the State. It thus appeared that the part of the Highway Law relating to the assessment of highway labor upon property in highway districts, comprising possibly one-third of the entire law upon the subject of highways, was inoperative in more than two-thirds of the towns. The new law makes mandatory the raising of money for highway purposes by tax, and entirely eliminates the time-worn and ineffective method of building and repairing highways by the assessment of day's labor. To accomplish this object many new provisions have been provided; and new methods of procedure and operation have been adopted. Town superintendents of highways are continued with powers as nearly identical with those of the former commissioners as is possible in view of the changed conditions. Taxation for highway purposes and the expenditure of town money remains under local control as under the former system. State and county agencies are provided to aid the towns in securing a uniformly efficient development of the town system. The State commission, when organ-

ized, will be prepared to co-operate with the town officers in securing desired results, and the district and county superintendents will be required to aid such officers, by advice and suggestions, in improving the condition of town highways.

**Higbie-Armstrong Act.** In 1898 the Legislature, by enacting the so-called Higbie-Armstrong Act (L. 1898, chap. 115), first adopted the policy of permanently constructing or improving highways at the joint expense of State, county and town. The basis first adopted was 50 per cent. by the State, 35 by the county and 15 by the town. Under recent amendments the proportion to be borne by the State has been increased in those counties and towns where the assessed valuation of the property therein is small in proportion to the total highway mileage. These highways have been constructed, improved and maintained under the supervision of the State Engineer, subject only to the initiative to be taken by the local boards of supervisors, the approval of plans and specifications and the final acceptance of the completed work by such boards.

**Constitutional provision.** In 1905 the people adopted an amendment to the Constitution (Const., art 7, § 12) authorizing the incurring of an indebtedness which shall not at any one time exceed the sum of \$50,000,000 for the improvement of highways. This constitutional amendment evidently contemplated the construction and improvement of a permanent system of highways throughout all the counties. The highways to be so improved are required, by the section referred to, to be equitably apportioned among the counties. The method of construction and improvement, subject to this limitation, is left to the discretion of the Legislature.

This new law classifies the highways to be constructed or improved from the proceeds of the issue and sale of bonds authorized by the above section of the Constitution, into State highways and county highways; the former to be constructed or improved at the sole expense of the State, the latter at the joint expense of State, county and town (see § 3, *post*). The methods and procedure used in the construction or improvement of highways under the former law (L. 1898, chap. 115, and the acts amendatory thereof) have been retained, with such changes as seemed desirable to bring about a more economical and advantageous disposition and expenditure of the moneys available. The commission created by the act is to have plenary powers relative to the construction or improvement of State highways, and practically the same supervision and control over county highways as was formerly possessed by the State Engineer.

**State highways.** The specification and description of the highways to be constructed or improved at the sole expense of the State (see § 120, *post*) mark a distinct epoch in highway construction or improvement in this State. The scheme involves the building of through routes extending into every portion of the State, reaching every important city and village, and providing means of transportation for the agricultural products of every locality. The entire proposed mileage will approximate 3,500 miles. No other State in the Union has as yet even considered the building of highways on such an enormous scale, and probably no other state is so fortified with resources as to make possible such a comprehensive plan of highway construction. Admitting, as every one must, the close relation between the commercial prosperity of a state and a properly constructed and maintained system of



roads, the people of our State should view with favor the successful effort of the Legislature to provide available means for the not far distant completion of a comprehensive system of permanent highways.

**Joint legislative committee on highways.** We have appended to this work the Report of the Joint Committee of the Senate and Assembly Appointed to Investigate the Subject of Highways, of which Senator Jotham P. Allds was chairman (Appendix A.). This committee held numerous hearings throughout the State, securing from every locality a consensus of opinion as to the needs thereof in respect to the highways and as to how most effectively to provide for the development and improvement of our highway system. A revision of all highway laws was demanded by all, and the committee gave its careful attention to this matter. Not only was revision required, but old and obsolete methods of transacting town business in relation to highways were to be eliminated and new and more uniformly effective procedure substituted therefor; complex and ineffective supervision and control were to be displaced by the organization of a practical and business-like administrative department; new and vast enterprises for the improvement, development and maintenance of a State system of highways were to be vitalized, and provision made for carrying them into successful consummation. This revision was completed under the personal direction of the committee and credit for the successful completion of the work is chiefly due to the legal acumen, legislative experience and comprehensive knowledge of statute law of the members of the committee especially that pertaining to highways and the powers and duties of town and county officers.

§ 2. **Definitions.**—1. The term “department,” when used in this chapter, shall mean the department of highways as constituted herein.

2. The term “commission,” when so used, shall mean the state commission of highways.

3. The term “district superintendent” or “county superintendent,” when so used, shall mean the district superintendent of highways or county superintendent of highways respectively.

4. The term “town superintendent,” when so used, shall mean the town superintendent of highways.

5. A highway within the provisions of this chapter shall be deemed to include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls and all bridges having a span of five feet or less.

**Derivation.** This section is new, except that section 53 of the Highway Law, as amended by L. 1907, chap. 716, provides in effect that a bridge with a span of more than five feet is not included as a part of a highway. This provision is contained in subd. 5 of this section.

**Use of definitions.** The purpose of defining the terms enumerated in this section is to state the meaning of such terms when used in this chapter. Wherever any of these terms are so used reference should be made to this section to determine their meaning. It will be noticed that county engineers

and county superintendents are hereafter to be known as district superintendents or county superintendents, and that the commissioners of highways under the former law are hereafter to be known as town superintendents.

**Definition of highway.** The term highway is defined herein for the purpose of determining what such term includes when used in this chapter. It is not intended as exclusive of the ordinary common law definition of a highway. The main object was to authorize the construction and repair of "culverts, sluices, drains, bridges, waterways, embankments, retaining walls and all bridges having a span of five feet or less" as a part of the highway.

At common law a highway is defined as a way over which the public at large have a right of passage whether it be a carriageway, a horseway or footway, or a navigable river. 3 Kent's Commentaries, 432. Any way which is common to all people without distinction is a highway. *People v. Kingman*, 24 N. Y. 559 (1862).

In the following cases a highway is defined as a passage opened to all citizens of the State to go and return, pass and repass at their pleasure. *Morse v. Sweeney*, 15 Ill. App. 486, 492 (1884); *People v. Jackson*, 7 Mich. 432, 446 (1859), 74 Am. Dec. 729; *Carli v. Stillwater St. Ry. Co.*, 28 Minn. 373, 10 N. W. 205 (1881). *In re Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076, 1099 (1891); *Starr v. Camden & A. R. Co.*, 24 N. J. Law 592, 597; *State v. Stroud*, 52 S. W. 697, 698 (1898); *Bailey v. Commonwealth*, 78 Va. 19, 21 (1883).

A highway is a public way, open and free to any one who has occasion to pass along it on foot or with any kind of a vehicle. *Laufer v. Bridgeport Traction Co.*, 68 Ct. 475, 37 Atl. 379, 381, 37 L. R. A. 533.

A public highway, as distinguished from a private road is one which is open to the travel of the public. It is the right to travel upon it by all the world and not the exercise of the right which makes it a public highway. *Matter of Mayor, etc., of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825.

**Kinds of highways.** *a. In general.* A highway is a public road, which every citizen of the State has a right to use for the purpose of travel thereon. They are of many kinds varying from the state of civilization and the wealth of the country through which they are constructed and according to the extent of the traffic to be carried on them. *Shelby County Commissioners v. Castetter*, 7 Ind. App. 309., 33 N. E. 986, 987.

*b. Streets.* There is no doubt that the term "highway" as generally used includes the streets of a city or village. *Adams v. S. & W. R. R. Co.*, 11 Barb. 449; *Benedict v. Goit*, 3 Barb. 459; *Brace v. N. Y. Central R. R. Co.*, 27 N. Y. 271. A street is a highway but all highways are not streets. As distinguished from the word highway, which means a public thoroughfare over and on which all the citizens of the land have a right to pass and repass at large, it means a public highway of a city, town or village merely. *State v. Moriarty*, 74 Ind. 103. A street is a road or public way in a city, town or village. As the way is free to all the people it is a highway and it is proper to affirm that all streets are highways, although all highways are not streets. *Sachs v. Sioux City*, 109 Iowa 224, 228. 80 N. W. 336; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, 182; *Lord v. Gifford*, 67 N. J. Law 193, 50 Atl. 903.

And under § 99 of R. S. Pt. 1, chap. 16, tit. 1 (§ 234 of the present law)

providing that all highways that have ceased to be traveled or used as highways for six years shall cease to be a highway for any purpose, and it was held that the term "highway" applies to a village street. *Excelsior Brick Co. v. Village of Haverstraw*, 142 N. Y. 146, 36 N. E. 819; *Horey v. Village of Haverstraw*, 124 N. Y. 273, N. E.

Notwithstanding these cases there is a wide distinction between rural highways and village and city streets. The rights of the traveling public and of abutting owners therein are materially different. The law pertaining to the use of a highway, in its restricted sense, is not in all cases the same as that which applies to a city or village street. For instance, it has been held that the word "highway," as used in a statute requiring railroads to erect sign boards at highway crossings, means a public road in the country, and not a street in a town or city. *Mobile & O. R. Co. v. State*, 51 Miss. 137, 140.

Whether or not a statute pertaining to highways is also applicable to streets is a question depending largely upon the character of the statute and the purposes for which it was enacted. It will probably be presumed, in the absence of provisions pointing to a contrary construction, that the highways within the meaning of the present highway law do not include streets, and that the provisions of such law are not applicable thereto. As expressly stated by the Court of Appeals in the case of *In re Burns*, 155 N. Y. 23, 49 N. E. 246: "The term 'highway' is frequently used in a very broad sense. The sea is said to be the great public highway of nations. The canals and all public rivers and the Great Lakes are certainly highways. So are all railroads. The term, in its ordinary and popular sense, refers to the country roads under the management and control of the local authorities of the several towns or counties of the State. It does not include streets or avenues in cities as expressly held *In re Woolsey*, 95 N. Y. 135, though it cannot be denied that such streets or avenues are highways in the broad sense."

*c. Sidewalks included.* A sidewalk is as much a part of the highway as the traveled wagon road is. *People v. Meyer*, 26 Misc. 117, 56 N. Y. Supp. 1097, 1099. See also *Martinovich v. Wooley*, 128 Cal. 141, 60 Pac. 760; *Ex parte Taylor*, 87 Cal. 91, 94, 25 Pac. 258; *Board of Public Works v. Hayden*, 13 Colo. App. 36, 56 Pac. 201, 204; *City of Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; *Challiss v. Parker*, 11 Kan. 384, 391.

*d. Turnpikes and plankroads.* Turnpikes and plankroads are also regarded as public highways, established by public authority for public use. The only difference between these and common highways is, that instead of being made at public expense, they are authorized and laid out by public authority, and made at the expense of individuals, and the cost of construction and maintenance is reimbursed by a certain established toll. Every traveller has the same right to the use thereof on the payment of legal toll, as he would have to use any other public highway. See *Commonwealth v. Wilkinson*, 16 Pick. (Mass.) 175, 26 Am. Dec. 654. It is said in *Murray v. Berkshire County Comm'rs*, 12 Metc. (Mass.) 455, that a turnpike road is a public highway which all people have a right to use, and which no one has a right to obstruct, not even the corporation that built it, except so far as it is expressly authorized to do so in order to secure the tolls granted by law.

The following cases are to the effect that public highways include toll roads: *Dodge County Comm'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625; *Fox v. Union Turnpike Co.*, 59 App. Div. 363, 69 N. Y. Supp. 551, 553; *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735, 742.

Toll roads and bridges are subject to the provisions of the Transportation Corporations Law, §§ 120-151, *post*.

*e. Bridges.* Ordinarily it may be said that a highway includes all bridges necessary for the proper use of such highway by the traveling public. It has been held that as a general proposition bridges are treated as portions of the highways which cross them, and are to be maintained by the same authorities to whom the duty of repairing the highway is committed. *Washer v. Bullitt County*, 110 U. S. 558, 568, 4 Sup. Ct. 249, 28 L. Ed. 249; *Dodge County Comm'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625; *Rapho & W. H. Townships v. Moore*, 68 Pa. St. 404, 406, 8 Am. Rep. 202. A bridge, by the concurrent testimony of all past time, in every possible shape and form, is but the ordinary road carried across the stream. *Mahnken v. Board of Chosen Freeholders*, 62 N. J. Law, 404, 41 Atl. 921, 923.

Notwithstanding the rule that in an ordinary sense a highway includes bridges thereon, there are many authorities to the effect that since bridges are so much more expensive to construct, and require so much greater care in their maintenance, express and special provision should be made for them and they are not necessarily to be included within provisions made for the construction and repair of highways. *St. Louis, A. & T. H. R. Co. v. People*, 200 Ill. 365, 65 N. E. 715; *State v. Canterbury*, 28 N. H. 195, 231.

The definition contained in this section only includes bridges "having a span of five feet or less;" other bridges are not included within the provisions for the construction, improvement, maintenance or repair of state, county or town highways.

*f. Cul-de-sac.* A way which is open at one end only is a cul-de-sac. Although every public thoroughfare is a highway, it is not essential that every highway should be a thoroughfare, as it is now well settled that a cul-de-sac may be a highway. *Elliot on Roads & Streets*, § 2. In the case of *Holdane v. Cold Spring Trustees*, 23 Barb. 103, two of the three judges held that a cul-de-sac could not be a highway. They based their decision upon what they supposed to be the common law. It has been laid down by Lord Kenyon in *Rugby Charity v. Merryweather*, 11 East (Eng.), 376, that a mere cul-de-sac might be a highway; that otherwise such places would be traps to catch trespassers. And in *Bateman v. Bluck*, 14 Eng. Law & Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere cul-de-sac, and not a thoroughfare.

In the case of *People v. Kingman*, 24 N. Y. 559, the Court of Appeals very pointedly condemned the decision in *Holdane v. Cold Spring Trustees*, 23 Barb. 103, and held that upon principle as well as authority it is no objection to the highway that it is a cul-de-sac; that public ways with outlet at one end may, and even do, exist. See also *Bartlett v. City of Bangor*, 67 Maine 460, 467; *People v. Van Alstyne*, 3 Keyes, 35, 37; *Saunders v. Townsend*, 26 Hun, 308, 309.

The fact that a way is a *cul-de-sac* may tend to show that it is not a highway and may be important in weighing presumptive evidence of dedication. *Bateman v. Bluck*, 14 Eng. Law & Eq. 69. As to dedication of highways, see § 191, *post*.

*g. Private roads.* Special provisions are made in this chapter for the laying out of private roads. See §§ 211–226, *post*. A private road is not subject to the control of public authorities, and the town is not responsible for the condition thereof. Where a way is laid out and used as a private road the mere fact that the public also makes use of it without objection from the owner will not make it a highway. If the use of the public is not clearly declaratory of the right to use it as a highway and is not so understood by the owner of the fee, the public will not acquire the free right of passage nor will it be burdened with the duty of making it safe and convenient for passage. Elliot on Roads and Streets, § 5. A way opened by the owners of private lands for the accommodation of the lands through and to which it leads, although laid out as a public road, must be deemed a private way, even if the public are permitted to travel over it, unless it be shown to have been dedicated to, and accepted and adopted by the public as a public highway. *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966. As to what constitutes a dedication of a private road as a public highway, see § 191, *post*, and the cases cited thereunder.

*h. Right to travel outside of highway.* If a highway be impassable or foundrous, or even dangerous to be traveled over, or incommodious from being out of repair, or from other causes the public have a right to a new way for the time being and for this purpose may go on the adjoining land. If the adjoining land be inclosed, the traveler may remove so much of the fence as will enable him to pass around the obstruction, but he must do no unnecessary injury. *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652; *Holmes v. Seely*, 19 Wend. 507.

The necessity creating the right to deviate from the highway and go upon the adjoining land need not be absolute, but must be reasonable. Whether there is a reasonable necessity for so going upon the adjoining land is in most cases a question of fact. It will probably not, however, be necessary to show in any case that to attempt to keep in the traveled way would certainly result in injury, but it would be enough to show that serious injury would probably result from being in the road. Elliot on Roads and Streets, § 13.

It has been held in other States that the defect permitting a deviation from the highway need not be in the way itself, but that if it is caused by the accumulation of snow or ice there exists such reasonable necessity for leaving the traveled way as will justify the traveler in going on the adjoining land. If a traveler can, by the use of ordinary care, use a highway so obstructed with probable safety it will be his duty to keep in it. Such a right is not to be exercised for convenience merely, nor when, by the exercise of due care after notice of obstruction, other ways may be selected and the obstructions avoided. *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

§ 3. **Classification of highways.**—Highways, the construction, improvement or maintenance of which is provided for in this chapter, are hereby divided into three classes:

1. State highways are those constructed or improved under this chapter at the sole expense of the state, including those high-

ways specified and described in section one hundred and twenty of this chapter.

2. County highways are those heretofore or hereafter constructed or improved at the joint expense of state, county and town, as provided by law, except those highways specified and described in section one hundred and twenty of this chapter.

3. Town highways are those constructed, improved or maintained by the town with the aid of the state, under the provisions of this chapter, including all highways in towns, outside of incorporated villages constituting separate road districts, which do not belong to either of the two preceding classes.

**Derivation and object of section.** This section is new. The present law, by providing for the construction of State highways at the sole expense of the State, creates a class of highways not contained in the former law. The county highways are the same as those formerly constructed under the so-called Highie-Armstrong Act (L. 1898, chap. 115 and the acts amendatory thereof) at the joint expense of State, county and town. After the determination of the highways to be constructed as State and county highways, all other highways, outside of incorporated villages constituting separate road districts, are to known as town highways, subject to the control of towns, as provided in this chapter.

The highways classified and denominated in this section will be referred to in this chapter under the terms here used, and the descriptions contained will be equivalent to definitions of the three classes of highways, so that where a State highway, a county highway, or a town highway is referred to hereafter in this chapter they will be deemed to be those described in this section.

## ARTICLE II.

### Department of Highways.

Section 10. Department of highways established.

11. State commission of highways; deputies; secretary and other clerks, officers and employees.
12. Oath of office; undertakings.
13. Principal office; official seal; stationery.
14. Salaries and expenses.
15. General powers and duties of the commission.
16. Division of state; division engineers.
17. Duties of division engineers.
18. Blank forms and town accounts.
19. Examination of accounts and records.
20. Condemnation of bridges.
21. Estimate of cost of maintenance of state and county highways.
22. Rules and regulations for state and county highways.

§ 10. **Department of highways established.**—There is hereby established a department, to be known as a department of high-

ways, which shall be constituted as provided in this chapter, and shall have the powers and perform the duties hereinafter prescribed.

Derivation. This section is new.

§ 11. State commission of highways; deputies, secretary, and other clerks, officers and employees.— On or before the tenth day of January, nineteen hundred and nine, the governor shall appoint three commissioners of highways, by and with the advice and consent of the senate, who shall constitute the state commission of highways, and shall devote all of their time to the duties of their office. Of the commissioners first appointed one shall be designated by the governor as chairman during the term of office of said commissioner. One of them shall be a practical civil engineer who shall have had actual experience in the construction of highways and bridges. The commissioners first appointed hereunder shall hold office for terms of two, four and six years commencing on the first day of January, nineteen hundred and nine, to be designated by the governor when making the appointment. One of such commissioners shall belong to the party casting at the last preceding state election the next to the highest number of votes for governor, and whenever appointments are made to fill vacancies caused by the expiration of term or otherwise they shall be made so that at least one of such commissioners shall belong to such party. Upon the expiration of each of such terms the term of office of each commissioner thereafter appointed shall be six years from the first day of January succeeding the expiration of the term of office of his predecessor. If a vacancy shall occur otherwise than by expiration of term it shall be filled by appointment for the unexpired term. The commission shall appoint two deputies, each of whom shall have had practical experience in the actual building, construction and maintenance of highways and be familiar with the operation and effect of state statutes relating to highways and bridges. One of such deputies shall be known as the first deputy and his duties shall relate to the maintenance of state and county highways; the other shall be known as the second deputy, and his duties shall relate to the improvement, repair and maintenance of town highways and bridges. Each of such deputies shall have such other and further duties as may be imposed upon him by the

commission. The commission shall appoint a secretary who shall have the duties prescribed by the commission. The commission shall appoint such resident engineers, clerks, officers and employees as may be required to carry out the provisions of this chapter, subject to the civil service laws and the provisions of this chapter, within the amount appropriated therefor, unless the appointment of such clerks, officers or employees is otherwise provided for herein. District superintendents, appointed as provided in this chapter, shall be appointed from lists prepared from examinations which shall test their qualifications for the actual construction and maintenance of highways and their executive capacity, rather than their scientific attainments. Clerks, other than those employed in the principal office of the commission, inspectors and other employees in the department whose duties pertain to the maintenance of highways, shall likewise be selected from lists prepared from examinations testing their general knowledge of the highway law and of the practical construction of highways. Inspectors of construction, other than engineers and levelers, shall be selected from lists similarly prepared, except that they shall be residents of the county within which the highway constructed or improved is located. To the end that the employees of the department of highways engaged in the work of constructing, improving or maintaining highways under the provisions of this chapter may be practical highway builders, the highway commission is authorized to indicate to the civil service commission the relative value which should be given to experience and scientific attainments.

**Derivation.** This section is new.

**References.** The manner of making an appointment by the Governor by and with the advice and consent of the Senate is prescribed by Public Officers Law, § 7. Commissions are issued to persons appointed, signed by the Governor and attested under the seal of the State by the Secretary of State, and copies are recorded in his office. Public Officers Law, § 8. Officers appointed by the Governor by and with the advice and consent of the Senate may be removed by the Senate upon the recommendation of the Governor. Public Officers Law, § 22.

Vacancies occurring during the session of the Senate are to be filled in the same manner as an original appointment; but vacancies occurring while the Senate is not in session are filled for a term expiring twenty days after the commencement of the next session of the Senate. Public Officers Law, § 28. A person appointed to fill a vacancy in the office of the commissioner would hold his office for the balance of the unexpired term. Public Officers Law, § 27.



**Political qualifications.** The Civil Service Law provides that not more than two of the civil service commissioners shall be adherents of the same political party. The Court of Appeals in the case of *Rogers v. Common Council of the City of Buffalo*, 123 N. Y. 173, held that such legislation, by providing that not more than a certain proportion of the members of the commission should be taken from one party, does not amount to an arbitrary exclusion from office or to a general regulation requiring qualifications not mentioned in the State Constitution.

**Deputies, secretary and other officers and employees.** The statute requires the appointment of two deputies and a secretary. The first deputy shall perform the duties prescribed by the commission in respect to State and county highways, while the duties of the second deputy are to be limited to town highways and bridges. The commission is authorized to create such other offices as may be necessary to carry out the provisions of the chapter. By section 311, *post*, the commission is authorized to retain in its employment "resident and other engineers, levelers, rodmen, clerks and employees engaged or connected with the department of highways in the office of the state engineer," and all such officers are eligible to transfer and appointment and positions under the commission without civil service examination. District superintendents are to have the powers and perform the duties prescribed by section 33, and are to be appointed and their salaries are to be paid as provided in section 31. As to appointment and duties of deputies, see Public Officers Law, § 9.

§ 12. **Oath of office; undertaking.**—Each of such commissioners shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office and execute an undertaking in the sum of twenty-five thousand dollars, to be approved by and filed with the comptroller and renewed as often as the governor may require. Such undertaking shall be to the effect that each such commissioner will faithfully discharge the duties of his office and promptly account for and pay over all moneys or property received by him as such commissioner in accordance with law, or in default thereof that the parties executing such undertaking will pay all damages, costs and expenses resulting from such default. Each of the deputies and the secretary shall execute an undertaking in the sum of five thousand dollars to be approved by the commission and filed in its office.

**Derivation.** This section is new.

**References.** Every officer is required to take and file the oath of office required by law before he shall be entitled to enter upon the discharge of any of his official duties. Public Officers Law, § 10. This same section provides that such an oath may be administered by any officer authorized to take an acknowledgment of the execution of a deed. Section 11 of the

Public Officers Law also provides for the conditions of an official undertaking and should be complied with except so far as the same is inconsistent with the provisions of this section. Section 12 of the Public Officers Law prescribes the force and effect of an official undertaking.

§ 13. **Principal office; official seal; stationery.**—The principal office of the department shall be in the city of Albany in rooms provided by the trustees of public buildings. The department shall have an official seal, to be prepared by the secretary of state, as provided by law. The offices of the department shall be supplied with necessary postage, stationery and office furniture and appliances, to be paid for out of moneys appropriated therefor, and it shall have prepared for it by the state, such books and blanks as are required for carrying on the business of the department.

**Derivation.** This section is new.

**Seals.** The official seal of each State officer authorized to use an official seal must be of metal with the device of the arms of the State surrounded with the inscription, State of New York, and the name or official designation of the officer. The size of the seal is required to be two and one-quarter inches in diameter. They are to be prepared by the Secretary of State. Public Officers Law, § 40. As to the method of impressing seals of public officers on instruments, see Statutory Construction Law, § 13.

**Business and public offices on public holidays.** Holidays and half-holidays are to be considered as Sunday for all purposes relating to the transaction of business in the public offices of the State and of each county. Public Officers Law, § 41.

§ 14. **Salaries and expenses.**—The chairman of the commission shall receive an annual salary of six thousand dollars; each of the other commissioners shall receive an annual salary of five thousand dollars. The first and second deputy and secretary shall each receive an annual salary of three thousand five hundred dollars. The clerks, officers and other employees of the department shall receive the compensation fixed by the commission except as otherwise defined and established in this chapter and by the annual appropriation and supply bills. In the discharge of their official duties such commissioners, deputies, secretary, and the clerks, officers and other employees of the department shall have reimbursed to them their necessary traveling expenses and disbursements. Such salaries and expenses shall be paid by the state treasurer upon the warrant of the comptroller, out of moneys

appropriated therefor in the same manner as the salaries and expenses of other officers, clerks and employees are paid.

**Derivation.** This section is new.

**Payment of salaries and expenses.** Salaries of State employees are payable monthly; see L. 1838, chap. 333, § 16. If payment is to be made of the traveling expenses a statement must be furnished showing distance traveled, between what places, the duty or business for the performance of which the expenses were incurred and the dates and items of each expenditure. State Finance Law, § 12. The appropriation act of each year provides that "the salary or compensation of any officer or employee when not prescribed by law, for which an appropriation is made by this act, may be fixed by the department, official or officials, appointing such officer, or employing such employee at a less, but not a greater sum than the amount appropriated for the salary or compensation of such officer or employee."

§ 15. General powers and duties of the commission.— The commission shall

1. Have general supervision of all highways and bridges which are constructed, improved or maintained in whole or in part by the aid of state moneys.

2. Prescribe rules and regulations not inconsistent with law, fixing the duties of division engineers, district, county and town superintendents in respect to all highways and bridges composing the state and county systems and determining the method of the construction, improvement or maintenance of such highways and bridges. Such rules and regulations shall, before taking effect, be printed and transmitted to the highway officers affected thereby.

3. Compel compliance with laws, rules and regulations relating to such highways and bridges by highway officers and see that the same are carried into full force and effect.

4. Aid district, county and town superintendents in establishing grades, preparing suitable systems of drainage and advise with them as to the construction, improvement and maintenance of highways and bridges.

5. Cause plans, specifications and estimates to be prepared for the repair and improvement of highways and the construction and repair of bridges, when requested so to do by a district, county or town superintendent.

6. Investigate and determine upon the various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of highways and bridges.

7. Make an annual report to the legislature on or before February fifteenth, stating the condition of the highways and bridges, the progress of the improvement and maintenance of state, county and town highways, the amount of moneys received and expended during the year, upon highways and bridges and in the administration of its office, and also containing such matters as in their judgment should be brought to the attention of the legislature, together with recommendations as to such measures in relation to highways as in their judgment the public interests require.

8. Compile statistics relating to the public highways throughout the state, and collect such information in regard thereto as they shall deem expedient.

9. Cause public meetings to be held at least once each year, in each district or county, for the purpose of furnishing such general information and instructions as may be necessary, regarding the construction, improvement or maintenance of the highways and bridges and the application of the highway law, and the rules and regulations of the department, and also for the purpose of hearing complaints. They shall notify the district or county superintendent of their intention to hold such meeting or meetings, specifying the date and the place thereof.

10. Aid at all times in promoting highway improvement throughout the state, and perform such other duties and have such other powers in respect to highways and bridges as may be imposed or conferred on them by law.

11. Approve and determine the final plans, specifications and estimates for state and county highways upon the receipt of the report and recommendations of the county or district superintendent, as provided herein, and transmit the same in the case of a county highway to the board of supervisors. After the approval of such plans, specifications and estimate by the board of supervisors and the return thereof to the commission, in the case of a county highway and after their final determination in respect thereto in the case of a state highway, the commission shall cause a contract to be let for the construction or improvement of such state or county highway after due advertisement.

12. Prepare tables showing the total number of miles of high-

ways in the state, by town and county, and file a copy of the same in the office of the comptroller.

**Derivation.** This section is new in form. Many of the powers and duties prescribed therein were formerly possessed by the State Engineer. Former Highway Law, § 55-c, as amended by L. 1897, chap. 743, required town officers to comply with the directions and rules of the State Engineer in respect to highways and the improvement, repair and maintenance thereof. L. 1907, chap. 717, required the State Engineer to collect information and compile statistics, determine as to methods of construction and consult with and aid local officers and hold meetings in each county. All of these duties are retained in this section to be exercised by the commission.

**Supervisory power.** The supervisory power of the commission extends to all highways which are constructed, improved or maintained in whole or in part by the aid of State moneys. These highways include not only State and county highways, but also town highways, since under the present law the State contributes to the improvement of such highways in all the towns of the State. The duty of supervision will probably be held to include the compelling of a compliance with the provisions of this chapter by town officers, relating to town highways. The theory of the law, however, is that the town highways should remain under local control and that the commission and the county and district superintendents are only to advise and aid the local officers in the care and maintenance of such highways. Certain duties are hereinafter imposed upon town superintendents. The commission in the exercise of its power of supervision may see that those duties are performed, but they cannot otherwise interfere in relation to town highways.

**Rules and regulations.** The rules and regulations to be prescribed by the commission must conform to other positive declarations of the statute. If a rule does not conform to the law the rule is bad and unenforceable. The commission is authorized by subdivision 3 to compel compliance with the rules and regulations, provided, of course, that such rules and regulations are lawfully enacted. Section 22 of this law authorizes the commission to make rules and regulations for the use of State and county highways by the traveling public. The rules and regulations provided for in section 15 pertain entirely to the duties of highway officers. Under section 55c of the former Highway Law, as amended by L. 1897, chap. 743, town officers, in which the money system of highway taxation was in existence, were required to comply with the directions of the State Engineer in respect to all highways within the town and the "rules and regulations in addition thereto of the county engineer."

**Aid to local highway officers.** The commission will be authorized by this section to assist county and town superintendents in establishing grades and in performing other work connected with the construction or improvement of town highways. The commission may also, when asked by a district, county or town superintendent, have plans prepared for the construction and repair of town highways and bridges. By subdivision 10 it is made the duty of the commission to provide for the promotion generally of highway improvement throughout the State.

**Report, statistics and tables.** The commission is required to make an annual report to the Legislature containing the matters stated in subdivision 7. The commission is not limited in the form, substance or contents of this report, but may include in it anything which it thinks should be brought to the attention of the Legislature. The commission is also required to compile highway statistics. These are similar to those formerly prepared and published by the State Engineer. Tables must be prepared, under subdivision 12, showing the total highway mileage in each county and town. These tables are required to be filed with the Comptroller. The amount of State aid to the towns depends upon the assessed valuation and the total mileage. See § 101, *post*. The proportionate amount to be paid by county and town is also determined under section 141, by dividing the total assessed valuation of taxable property in the county and town by the total mileage of highways in such county or town. The tables of highway mileage are, therefore, very important.

**Public meetings.** The importance and desirability of public meetings in the different counties of the State is recognized in this section by continuing the provision already contained in section 15 of L. 1898, chap. 115, as amended by L. 1907, chap. 717. By section 33, subdivision 7, *post*, the county or district superintendent is directed to notify each town superintendent and supervisor of the time and place where such public meetings are to be held. By subdivision 10 of section 47 it is made the duty of the town superintendent to attend such meetings, and his expenses necessarily incurred thereby are a town charge.

§ 16. Division of state; division engineers.— The commission shall divide the state into not more than six divisions and shall appoint and assign to each division a division engineer. In making such division no county shall be divided. Each person so appointed as a division engineer shall be a practical civil engineer having had actual experience in the construction and maintenances of highways and bridges. The salary of such engineers shall be three thousand dollars per annum. An office may be maintained by such division engineers at a convenient place within each division as authorized by the commission. The salary and expenses of such engineers shall be paid out of moneys appropriated therefor upon the requisition of the commission. Each division engineer shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office and execute an official undertaking in the sum of ten thousand dollars to be approved by the commission.

**Derivation.** This section is new.

§ 17. Duties of division engineers.—Each division engineer shall devote his entire time to the performance of his duties. He shall, under the direction and control of the commission:

1. Make or cause to be made all surveys, maps, plans, specifications and estimates necessary or required for the improvement, construction and maintenance of state and county highways within the division for which he is appointed.

2. Examine, revise and approve all plans, specifications and estimates and proposals for the improvement, construction and maintenance of highways and bridges within his division, which may be submitted by the commission, pursuant to the provisions of this chapter, or the rules and regulations of the commission.

3. Examine and inspect, or cause to be examined and inspected, the work performed on any highways, and report to the commission as to whether the work has been done in accordance with the plans and specifications and contracts made therefor.

4. Approve and certify to the monthly estimates or allowances for work being performed under any contract let for the construction, improvement or maintenance of state and county highways.

5. Inspect, or cause to be inspected, all state and county highways, and report from time to time in respect thereto, when required by the commission.

6. Consult with district, county and town superintendents and other highway officers in respect to the proper methods of constructing, improving and maintaining highways and bridges.

7. Perform such other duties as may be prescribed by the commission.

**Derivation.** This section is new.

The duties of division engineers, it will be noticed, are practically limited to the improvement, construction and maintenance of State and county highways. They may be consulted by district, county and town superintendents in respect to town highways and bridges for the purpose of determining as to the best method of construction and maintenance.

§ 18. Blank forms and town accounts.—The commission shall prescribe and furnish blank forms of orders, reports and accounts and blank books, whenever in their judgment they are required for the convenience of their office and of highway officers.

**Derivation.** Section 28 of the former Highway Law, as added by L. 1906, chap. 363, and amended by L. 1907, chap. 719, provided that the State Engineer should prescribe the form of blanks to be used by highway commissioners and supervisors in keeping accounts of highway moneys. It also provided that the State Engineer should prescribe the form of orders given by highway commissioners upon supervisors.

**Highway accounts.** The commission is authorized to prescribe the method of keeping town accounts of highway moneys. See § 108, *post*.

§ 19. **Examination of accounts and records.**—The commission may, at such times as may be deemed expedient, cause an examination of all accounts and records kept as required by this chapter, and it shall be the duty of all county and town officers to produce all such records and accounts for examination and inspection, at any time on demand of a representative of the commission.

**Derivation.** This section is new.

**Town accounts** of moneys received and expended for highways, bridges, machinery, tools and implements, the removal of obstructions caused by snow, and for miscellaneous purposes, are to be kept in the manner prescribed by the commission. See § 108, *post*. All of these accounts under the above sections are to be open to examination and inspection by the commission or any of its representatives at all reasonable times.

§ 20. **Condemnation of bridges.**—The commission shall cause an inspection to be made of any bridge which is reported to be unsafe for public use and travel by the district or county superintendent, the town superintendent, or five residents of the town. If such bridge is found to be unsafe for public use and travel the commission shall condemn such bridge, and notify the district or county superintendent, the town superintendent and the supervisor of the town, of that fact. The district or county superintendent shall either prepare or approve plans, specifications and estimates for the construction or repair of such bridge without delay. The town shall provide for the construction or reconstruction of such bridge, as provided for by section ninety-three of this chapter.

**Derivation.** This section is new.

**Object of section.** The evident purpose of this section is to enable the commission to take action wherever a bridge is reported to be unsafe for public use and travel. If, after an inspection, such a bridge is found to be unsafe the commission must notify the officers named. Under section 93, *post*, it thereupon becomes the duty of the town superintendent to cause the bridge to be immediately repaired in accordance with plans and specifications prepared or approved by the district or county superintendent, subject to the direction and approval of the commission. If more than \$1,500 would be required for the repair or construction of a condemned bridge, section 94, subdivision 4, would require the submission of a proposition at a town meeting, as provided in section 95. If the proposition be adopted the town board may authorize the supervisor to borrow money in anticipation of taxes to be levied in pursuance of the proposition so submitted. It is also provided by section 97 that a proposition may be submitted authorizing the town to borrow money upon its bonds for the



repair or rebuilding of a bridge which has become unsafe for public use and travel. This section authorizes the commission to take the initiative in securing the rebuilding of an unsafe bridge, but it will be noticed by an examination of the sections referred to that the expenditure of the money remains under the control of local officers.

§ 21. **Estimate of cost of maintenance of state and county highways.**—The commission shall annually cause to be inspected all state and county highways, either by the division engineer, or the district or county superintendent of the district or county in which such highways are situated and shall require a complete report of such inspection which shall show in detail the condition of the highway inspected, the necessary work to be performed in the repair and maintenance of such highways, and the estimated cost thereof. The commission shall revise said estimates and annually report to the legislature its estimated cost of such repair and maintenance for the ensuing year, as so revised, in detail by town and county.

**Derivation.** This section is new in its present connection, but L. 1898, chap. 115, § 12, as amended by L. 1907, chap. 717, provided that “the state engineer and surveyor in his annual report to the legislature shall report the estimated cost for repair during the ensuing year of all highways maintained under this act, and shall expend in his discretion such appropriation as shall be made for the purpose by the Legislature.”

**Appropriations for maintenance.** By section 171, *post*, it is provided that there shall be annually appropriated for the maintenance and repair of State and county highways an amount sufficient to provide therefor, based upon the estimates prepared and submitted by the commission to the Legislature, as provided in this section. The object of this section is to provide an intelligent basis for the annual appropriation for the maintenance of State and county highways.

§ 22. **Rules and regulations for state and county highways.**—The commission is hereby empowered to make rules and regulations from time to time for the protection of any state or county highway or section thereof. They may prescribe the width of tires to be used on such highways and they may prohibit the use of chains or armored tires by motor vehicles upon such highways, and any disobedience thereof shall be punishable by a fine of not less than ten dollars and not exceeding one hundred dollars, to be prosecuted for by the town, county, or district superintendent and paid to the county treasurer to the credit of the fund for the maintenance of such highways in the town where such fine is collected.

**Derivation.** It is provided in L. 1898, chap. 115, § 12, as amended by L. 1907, chap. 717, last sentence, that “the state engineer is hereby further

empowered to make such rules as may from time to time be necessary for the protection of any such highway or section thereof, and any disobedience of such rules shall be punishable by a fine of not less than ten dollars and not exceeding one hundred dollars to be recovered by the state engineer for the benefit of such road maintenance fund." In this section the prosecution of all fines is by the town, county or district superintendent. There was nothing in the former law authorizing rules and regulations prescribing the width of tires and the use of chains or armor tires by motor vehicles.

Rules and regulations may be adopted by the commission prescribing the duties of highway officers. See § 15, subd. 2, *ante*.

### ARTICLE III.

#### District or County Superintendents.

Section 30. Appointment of county superintendents.

31. District superintendents; appointment and salaries.

32. Removal of county superintendents.

33. General powers and duties of district or county superintendents.

§ 30. Appointment of county superintendent.—The board of supervisors of any county may appoint a county superintendent, determine the amount of the bond which he shall give, fix his salary, which shall be a county charge, and may remove such county superintendent for malfeasance or misfeasance in office, upon written charges, after an opportunity to be heard, not less than five days after the service upon such superintendent of a copy of such charges. The term of office of each superintendent shall be four years unless sooner removed by the board of supervisors as above provided, or by the commission as hereinafter provided.

**Derivation.** This section is new. The former highway law, section 55, as amended by L. 1904, chap. 609, provided for the appointment of a county engineer by boards of supervisors, and prescribed his duties.

**Appointment and removal.** The county superintendent is to be appointed for the term of four years by a majority vote of the board of supervisors. His salary is a charge upon the county. If a county superintendent is not appointed, the commission, under the next section, is directed to appoint a district superintendent whose salary and expenses are to be paid in the first instance by the State and then apportioned by the commission among the counties constituting the district. The size and importance of the county will enter into the determination of the question whether it will be advisable from the standpoint of economy to appoint a county superintendent or to permit his work to be done by a district superintendent to be appointed by the commission. A county superintendent, when appointed, may be removed for malfeasance or misfeasance upon charges preferred. This section does not authorize a summary removal; there must be a cause, stated and proved, sufficient under this section to constitute malfeasance or misfeasance.

§ 31. **District superintendents: appointment and salaries.**—If the board of supervisors of any county shall fail to appoint a county superintendent, the commission shall place such county in a district with such other counties as they deem best and appoint a district superintendent therefor. A county may be divided, but no district shall contain more than five thousand miles of public highways. Such district superintendents may be removed by the commission at its pleasure. The commission shall fix the salaries of such superintendents. Such salaries, together with expenses, shall be paid monthly in the first instance by the state treasurer upon the warrant of the comptroller and the amount thereof shall be annually apportioned by the commission among the counties contained in the district, in proportion to the number of miles of public highways of such county and in such district. The comptroller shall certify the amount so apportioned to the board of supervisors of each of such counties, and such board shall annually levy and cause to be collected as a county charge the proportionate part of such salary, and the treasurer of each such county shall pay the sum so raised into the state treasury.

**Derivation.** This section is new.

§ 32. **Removal of county superintendent.**—The commission may remove a county superintendent for inefficiency, neglect of duty or misconduct in office, upon written charges after an opportunity of being publicly heard in his defense. A copy of such charges shall be personally served upon such superintendent and he shall be given not less than five days' notice of the time and place of the hearing. If upon such hearing it appears that the charges are sustained, the commission shall remove such superintendent and forthwith serve notice thereof by mail upon the superintendent and upon the chairman and clerk of the board of supervisors of the county for which he was appointed. Such notice shall state specifically the grounds for such removal. The record of the proceedings upon such hearing shall be filed in the office of the commission. The commission shall appoint a district superintendent for such county or cause it to be added to some other district, and it shall thereupon be made subject to the jurisdiction of the district superintendent thereof until the board of supervisors shall appoint a new county superintendent to fill the vacancy caused by such removal.

**Derivation.** This section is new.

**Object of section.** The scheme of the law in respect to district or county superintendents is to provide an officer having supervisory powers in the several counties and at the same time make him amenable to the general policy of the State commission. The statute secures to the locality home rule in respect to this office and at the same time provides for uniformity of control by the commission throughout the State. To accomplish this result it is provided that the commission may remove the county superintendent for cause as stated in this section.

**Removal proceedings.** This section permits of the removal of a county superintendent by the commission for the causes stated. The provisions of this section, relative to service of charges and notice must be strictly observed. The commission, on being authorized to hear charges against the county superintendent, may, under section 854 of the Code, require a person to attend before it and to give testimony in respect to the matter. A subpoena may be issued by and under the hand of the chairman of the commission requiring the person to attend.

**§ 33. General powers and duties of district or county superintendents.**—The district or county superintendent appointed as provided in this article shall, subject to the rules and regulations of the commission:

1. Have the general charge of all highways and bridges within his district or county and see that the same are improved, repaired and maintained, as provided by law, and have the general supervision of the work of constructing, improving and repairing bridges and town highways in his district or county.

2. Visit and inspect the highways and bridges in each town of his district or county, at least once in each year and whenever directed by the commission, and advise and direct the town superintendent how best to repair, maintain and improve such highways and bridges.

3. Examine the various formations and deposits of gravel and stone in his district or county, for the purpose of ascertaining the materials which are best available and suitable for the improvement of highways therein, and when requested by the commission submit samples of such formations and deposits and make a written report in respect thereto.

4. Establish, or cause to be established, such grades, and recommend such means of drainage, repairs and improvements, as seem to him necessary whenever requested by the town superintendent or town board.

5. Approve plans and specifications and estimates for the erection and repair of bridges and the construction and maintenance of town highways.

6. Report to the commission annually, on or before November fifteenth in each year, in relation to the highways and bridges in

his district or county, containing such matter and in such form as may be prescribed by the commission, and file a duplicate thereof with the clerk of the board of supervisors. Additional reports shall be made from time to time when required by the commission in respect to such matters as may be specified by them.

7. Whenever a public meeting for a county or district shall have been called by the commission he shall cause due notice to be mailed to each town superintendent and supervisor of the towns under his jurisdiction and give such notice by advertisement as shall be directed by the commission.

8. Inspect or cause to be inspected, if so directed by the board of supervisors, each county highway during its construction or improvement, and certify to the board of supervisors the progress of the work, and report to the commission any irregularities of the contractor or any failure on his part to comply with the terms of the contract.

9. Perform such other duties as may be prescribed by law, or the rules and regulations of the commission.

**Derivation.** Many of the powers and duties here referred to were formerly possessed by county engineers under former Highway Law, § 55, as amended by L. 1904, chap. 609. Under that section the county engineer was required to visit and examine the highways in each town and advise with the highway commissioners how best to repair, maintain and improve the same; he was required to report to the State Engineer, and to carefully inspect highways which had been improved under L. 1898, chap. 115, and furnish a detailed report of required repairs, and of the cost thereof. It was also provided under former section 55 that the work of repairing, improving or erecting bridges should be done under the general supervision of the county engineer, pursuant to plans prepared or approved by him.

**Rules and regulations of commission.** It is provided that the powers and duties herein conferred or imposed upon the district or county superintendents shall be exercised or performed subject to rules and regulations of the commission. By § 15, subd. 2, *ante*, the commission is authorized to prescribe rules and regulations fixing the duties of district and county superintendents, "not inconsistent with law."

**General supervision.** County or district superintendents may exercise a general supervision over town highways, but they cannot interfere with town superintendents where they are performing their duties as expressly prescribed by law. They may see that the law is enforced by town superintendents, and may advise and direct them in the performance of their duties.

**Gravel and stone deposits.** The object of requiring county and district superintendents to report to the commission as to deposits and formations of gravel and stone in their counties or districts, is to inform the commission of the availability of good material for highway construction so as to enable them to determine the kind and cost of material to be used in the construction of State and county highways in such localities.

Public meetings are called by the commission pursuant to § 15, subd. 9, *ante*, and town superintendents are required to be present, under § 47, subd. 10, *post*.

**Construction and maintenance of county and State highways.** Other duties are conferred by this act upon district and county superintendents, notably those relating to the construction of State and county highways contained in article VI, and those relating to the maintenance of such highways contained in article VII.

Inspection of county highways during construction is required of county and district superintendents, only when requested by boards of supervisors, in which event they are representatives of the county for the purpose of ascertaining whether the county is getting what it pays for. Under the old law the town and county had no opportunity to be heard during the construction of a highway, and in practice the highway was accepted solely upon the determination of the State Engineer although the localities were required to pay one-half of the cost. When such a highway is properly completed it is provided in section 134 that the board of supervisors is to accept the same, and this inspection will aid the board in arriving at a proper determination.

#### ARTICLE IV.

##### Town Superintendent; General Powers and Duties.

- Section 40. Election of town superintendent of highways.
41. Submission of proposition for appointment of town superintendent.
  42. Term of office of town superintendent.
  43. Vacancies; office of highway commissioner abolished.
  44. Deputy town superintendent.
  45. Compensation of town superintendent and deputy.
  46. Removal of town superintendent.
  47. General powers and duties of town superintendent.
  48. Contracts for the construction of town highways.
  49. Machinery, tools and implements.
  50. Town superintendent may hire machinery.
  51. Purchase of gravel and stone.
  52. Obstructions and their removal.
  53. Removal of obstructions from ditches, culverts and waterways.
  54. Removal of noxious weeds and brush within the highways, and of obstructions caused by snow.
  55. Assessment of costs against owners and occupants.
  56. Wire fences to prevent snow blockades.
  57. Entry upon lands by town superintendent.
  58. Damages to owners of lands.
  59. Damages for change of grade.
  60. Drainage, sewer and water pipes, cattle passes or crossings in highways.
  61. Trees and sidewalks.
  62. Expenditures for sidewalks.
  63. Allowances for shade trees.
  64. Custody of shade trees.

- Section 65. Compensation for watering troughs.  
66. Credit on private road.  
67. Neglect or refusal to prosecute.  
68. Erection of guide boards.  
69. Measurement of highways and report.  
70. Application for service of prisoners.  
71. Construction and repair of approaches to private lands.  
72. Unsafe toll bridges.  
73. Actions for injuries to highways.  
74. Liability of town for defective highways.  
75. Action by town against superintendent.  
76. Audit of damages without action.  
77. Closing highways for repair or construction.

§ 40. Election of town superintendent of highways.—At the biennial town meeting held next after the taking effect of this chapter, there shall be elected in each town a town superintendent of highways. A successor to the town superintendent, so elected, shall be elected at each biennial town meeting held thereafter in such town, unless the town shall have adopted as provided in section 41 a resolution that thereafter the town superintendent shall be appointed by the town board.

**Derivation.** This section is new. It supersedes section 12 of the Town Law, requiring each town to elect at its biennial town meeting one, two or three commissioners of highways. The superintendent of highways is to take the place of the commissioner of highways, and hereafter there can only be one superintendent in each town. This section also supersedes such part of section 15 of the Town Law as authorizes the electors of a town to determine by ballot the number of commissioners of highways to be elected.

**Certain towns not having highway commissioner.** Section 15 of the Town Law, as amended by L. 1906, chap. 384, provides that "in towns of less than two square miles in area, where five-sixths of the territory shall consist of an incorporated village or villages, the office of highway commissioner is hereby abolished, and in towns of more than two square miles in area and less than fourteen square miles in area, where two-thirds of the territory shall consist of an incorporated village or villages, the town boards shall have the power and authority, by a majority vote, at any regular meeting of such town boards, to abolish the office of highway commissioner or commissioners, and when so abolished shall file a certificate of such abolition signed by the supervisor and town clerk of such towns in the offices of the town clerk and the clerk of the county in which such town is located, and the powers and duties heretofore performed by him or them, shall devolve upon the town board of such town together with such further power and authority over highways, streets and bridges, as are now possessed by or that may be hereafter granted to boards of trustees of villages of the third class." This section of the Town Law is probably superseded by the above section of the Highway Law. It is the intent of the present law to provide for the election of a town superintendent in every town in the State. Every local act providing for the supervision and maintenance of highways and bridges by

any other officer is superseded and no longer effectual. The purposes of the present Highway Law could not be carried out if special provisions relating to the administration of matters pertaining to highways and bridges were to be retained in full force and effect.

**Eligibility and qualifications.** Every elector of the town is eligible to the office of town superintendent of highways. The Town Law, § 50, provides that "Every elector of the town shall be eligible to any town office, except inspectors of election shall also be able to read or write."

The Public Officers Law, § 3, also provides that "No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, be of full age, a citizen of the United States, a resident of the State, and if it be a local office, a resident of the political subdivision or municipal corporation of the State for which he shall be chosen, or within which the electors electing him reside, or within which his official functions are required to be exercised."

**Oath of office.** The Town Law, § 51, provides that "Every person elected or appointed to any town office, except justice of the peace, shall, before he enters upon the duties of his office, and within ten days after he shall be notified of his election or appointment, take and subscribe before some officer authorized by law to administer oaths in his county, a constitutional oath of office, and such other oath as may be required by law, which shall be administered and certified by the officer taking the same without reward, and shall within eight days be filed in the office of the town clerk, which shall be deemed an acceptance of the office; and a neglect or omission to take and file such oath, or a neglect to execute and file, within the time required by law, any official bond or undertaking, shall be deemed a refusal to serve, and the office may be filled as in case of a vacancy."

Under this section it will be the duty of each town superintendent of highways to take the constitutional oath of office and file the same within eight days thereafter in the office of the town clerk.

Section 10 of the Public Officers Law is in effect the same as the above section of the Town Law. Under section 13 of the Public Officers Law it is made the duty of the town clerk, with whom the oath of office of the superintendent is to be filed, to give notice to the town board of the failure of the town superintendent to take and file his official oath within the time required by law. The office of a town superintendent may be declared vacant for his failure to file an official oath and the town board may fill the same. See Town Law, § 65, and Public Officers Law, § 20, subd. 7. It has been held, however, in the case of the Matter of Drury, 39 Misc. 288, 79 N. Y. Supp. 498 (1902), that the provision of section 51 of the Town Law as to the time within which a town officer must take and file the constitutional oath of office is directory merely; if he takes and files his oath before his term begins and before his office is declared forfeited by judicial action, no vacancy exists and the town board cannot appoint.

**Form of constitutional oath.** The form of the constitutional oath as prescribed by the Constitution, art. 13, § 1, is as follows: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of town superintendent of highways of the town of \_\_\_\_\_ according to the best of my ability." If the town superintendent is elected as provided in this section, the Constitution also provides



that the oath shall contain the following clause: "And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute any money or other valuable thing as a consideration or a reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote."

**Before whom oath may be taken.** The oath must be taken and subscribed before some officer authorized by law to administer oaths in his county. This includes a justice of the Supreme Court, county judge, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, justice of the peace, notary public, or commissioner of deeds. Town Law, § 56, also provides that a town officer may administer any necessary oath in any matter or proceeding lawfully before him or any paper to be filed with him as such officer. Since the oath of office of a town superintendent is to be filed with the town clerk it is probable that such oath may be taken before the town clerk.

**Additional oath.** The Constitution expressly provides, article 13, section 1, that no other oath, declaration or test shall be required as a qualification for any office of public trust. Section 51 of the Town Law requires in addition to the constitutional oath of office "such other oath as may be required by law." Under the Constitution it would not be permitted by statute or by any rule or regulation to exact of a town superintendent of highways any other oath.

**Effect of failure to file oath.** A person who executes any of the functions of a public office without having taken and duly filed the required oath of office, or one having duly executed and duly filed the required security is guilty of a misdemeanor. Penal Code, § 42. This section of the Penal Code is not construed to affect the validity of acts done by a person exercising the functions of a public office where other persons than himself are interested in maintaining the validity of such acts. The failure of a town superintendent to take and file his oath, as required in section 51 of the Town Law, would not affect the powers and rights of such superintendent in his official capacity. The failure to file the oath does not of itself work a forfeiture. Such forfeiture must come from some act, judicial or otherwise, which effectually ousts the superintendent and severs his relation to the office and until then he is practically an officer *de jure*, having a defeasible title to the office. *Horton v. Parsons*, 37 Hun, 42 (1885). See also *People v. Crissey*, 91 N. Y. 616, 635 (1883); *In re Kendall*, 85 N. Y. 302, 305 (1881); *Foot v. Stiles*, 57 N. Y. 399 (1874).

The rule is that the defect, if any, in regard either to the executing and filing of an official bond or an official oath, only makes the officer's title defeasible and offers a cause for forfeiture, but does not create a vacancy. A vacancy in such a case can only be effected by a direct proceeding for that purpose. *People ex rel. Brooks v. Watts*, 73 Hun, 404, 26 N. Y. Supp. 280 (1893).

**Filing of oath as acceptance of office.** Under section 51 of the Town Law the filing of an official oath, as required therein, is to be deemed an acceptance of the office. In construing such provisions the Court of Appeals in the case of the *Matter of Bradley*, 141 N. Y. 527, 36 N. E. 598 (1894), said: "It is very clear that the latter contemplates two steps by the candidate

elected to office, the first to be taken is the filing of his oath of office. When that has been done, the office is deemed to have been accepted and that is equivalent to saying that the officer-elect has entered upon its duties. It is after so entering upon his office, and within a specified time thereafter, that he is required to execute and submit his undertaking. That he is regarded as in office when he has filed his oath is perfectly clear from the provision that neglect to file the oath within the prescribed time creates a vacancy. When he has evidenced in the required manner his acceptance of the office to which elected, his predecessor is out and has no further standing as a member of the town board."

**Undertaking of town superintendent.** *a. Provisions of Town Law.* Section 63 of the Town Law provides as follows: "Every commissioner of highways [now town superintendent of highways] shall, within ten days after notice of his election or appointment, execute an undertaking with two or more sureties, to be approved by the supervisor of his town, to the effect that he will faithfully discharge his duties as such commissioner [superintendent], and within ten days after the expiration of his term of office, pay over to his successor all moneys remaining in his hands as such commissioner [superintendent], and render to such successor a true account of all moneys received and paid out by him as such commissioner [superintendent], which undertaking shall be delivered to the supervisor, and filed by him in the office of the town clerk within ten days thereafter."

*b. Effect of new law upon undertaking.* It will be noticed that this undertaking is to be approved, as to the sufficiency of the sureties, by the supervisor. Under the former Highway Law, § 4, subd. 7, the expenditure of all moneys raised for highway purposes was vested in the highway commissioner, and under Tax Law, § 56, the tax warrant of a town collector required him to pay to the commissioner such sum as shall have been raised for the support of highways and bridges in the town. Under the present law, section 91, *post*, the warrant for the collection of town taxes directs that the money raised for highway and bridge purposes shall be paid to the supervisor, and under section 104, *post*, the supervisor is made the custodian of all town moneys received from any source and made available for highway and bridge purposes. It is therefore apparent that the necessity for an undertaking by a town superintendent is not so great under the present as under the former law; the part of such undertaking which is more important under the present law is that which holds the superintendent to the faithful discharge of his duties.

*c. General provisions relating to undertaking.* Section 11 of the Public Officers Law provides generally for the form, manner of executing and conditions of an official undertaking, and such section applies to the undertaking of a town superintendent of highways except where it is in conflict with the express provisions of section 63 of the Town Law. Such section of the Town Law does not require that the undertaking be for any specified amount. Section 11 of the Public Officers Law provides that: "The sum specified in an official undertaking shall be the sum for which such undertaking shall be required by or in pursuance of law to be given. If no sum, or a different sum from that required by or in pursuance of law, be specified in the undertaking, it shall be deemed to be an undertaking for the amount so required.

If no sum be required by or in pursuance of law to be so specified, and a sum be specified in the undertaking, the sum so specified shall not limit the liability of the sureties therein." Notwithstanding the fact that the undertaking of the superintendent is not required to be for any specified amount it is desirable to specify an amount therein, since such amount will determine the amount for which the sureties are to justify.

Section 11 of the Public Officers Law also provides that: "Every official undertaking shall be executed and duly acknowledged by at least two sureties, each of whom shall add thereto his affidavit that he is a freeholder or householder within the State, stating his occupation and residence and the street number of his residence and place of business if in a city, and a sum which he is worth over and above his just debts and liabilities and property exempt from execution. The aggregate of the sums so stated in such affidavits must be at least double the amount specified in the undertaking. The failure to execute an official undertaking in the form or by the number of sureties required by or in pursuance of law, or in the form so required, or the omission from such an undertaking of approval required by or in pursuance of law, shall not affect the liability of the sureties therein."

This section is directly applicable to the undertaking of a town superintendent of highways so far as the same supplements and is not in conflict with section 66 of the Town Law. Such section is as follows: "Every undertaking of a town officer, as provided by this chapter or otherwise, must be executed by such officer and his sureties and acknowledged or proven and certified in like manner as deeds to be recorded, and the approval indorsed thereon. The parties executing such undertaking shall be jointly and severally liable, regardless of its form in that respect, for the damages to any person or party by reason of a breach of its terms."

*d. Liability of sureties.* As provided in such section 66 of the Town Law the sureties are liable for the damages occasioned by any breach of the conditions of the undertaking. They are liable only for the default of their principal committed after the commencement of the term of office for which they become his sureties. Although their principal held the office during a preceding term they are not liable for a default which then occurred. In such a case those who were sureties for the officer for the preceding term must be looked to. *Bissell v. Saxton*, 66 N. Y. 55 (1876).

*e. Duties not to be performed until undertaking is given.* A town superintendent of highways must not perform any act affecting the disposition of highway moneys or property until he gives the required undertaking, "and any person having the custody or control of any such money or property shall not deliver the same to him until such undertaking is given." Public Officers Law, § 12. A person who executes any of the functions of a public office without having executed and duly filed the required security is guilty of a misdemeanor. Penal Code, § 42.

If the superintendent enters upon the discharge of any of his official duties before giving such undertaking the sureties upon his undertaking subsequently given for or during his official term shall be liable for all his acts and defaults done or suffered, and for all moneys and property received during such term prior to the execution of such undertaking, or if a new undertaking is given, from the time notice to give such new undertaking is

served upon him. Every such official undertaking is obligatory and in force so long as the superintendent continues to act as such and until his successor shall be appointed and duly qualified, and until the conditions of the undertaking shall have been fully performed. When his undertaking is renewed pursuant to law the sureties upon the former undertaking are not liable for any official act done or moneys received after the due execution, approval and filing of the new undertaking. Public Officers Law, § 12.

f. *Form of undertaking.* The undertaking of the town superintendent may be in the following form:

**FORM No. 1.**

**Undertaking of Town Superintendent of Highways.**

Whereas of the town , county of was on the day of , 19 , elected [or appointed] town superintendent of highways of the town of . in such county.

Now, Therefore, we, the said , town superintendent of highways of said town, and , residing in the town [village or city] of , and , residing in the town [village or city] of ; as sureties for the said , do hereby, under and pursuant to section 63 of the Town Law, and all other statutes made and provided, undertake and acknowledge ourselves, our heirs and administrators and executors, jointly and severally, firmly bound to and with the said town of , in the sum of dollars, that the said , town superintendent of highways of said town, will faithfully discharge his duties as such town superintendent of highways, and within ten days after the expiration of his term of office, pay over to his successor all moneys remaining in his hands as such town superintendent, and render to such successor a true account of all moneys received and paid out by him as such town superintendent in accordance with law, or in default thereof that we will pay all damages, costs and expenses resulting from such default, not exceeding the sum above specified.

Dated this day of , 19 .

.....  
*Town Superintendent of Highways.*

.....  
 .....  
*Sureties.*

STATE OF NEW YORK, }  
 COUNTY OF ....., } ss.:

On this day of , in the year 19 , before me, the subscriber, personally came , town superintendent of highways of the town of , and , his sureties, to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the said instrument.

.....,  
*Notary Public [or other official title].*

Affidavits of Sureties.

STATE OF NEW YORK, } ss.:  
COUNTY OF ....., }

....., being duly sworn, deposes and says that he is one of the sureties named in the foregoing undertaking, that he is a freeholder [or householder] within the State of New York; that his occupation is and that he resides in , county of [if he resides in a city state street number of residence and place of business]; that he is worth over and above all just debts and liabilities and property exempt from execution the sum of dollars [this sum must be at least twice the amount specified in the undertaking.]

Subscribed and sworn to before me this  
day of , 19 .

.....,  
Notary Public [or other official title].

[The other surety is required to make a similar affidavit.]

Approval of Supervisor.

I, , supervisor of the town of , county of , do hereby approve the foregoing undertaking as to its form, manner of execution and the sufficiency of the sureties thereon.

Dated this day of , 19 .  
.....,  
Supervisor, Town of .

Vote by electors in village. Section 36 of the Town Law, as amended by chapter 363 of the Laws of 1898, contains the following provisions: "When any town shall have within its limits an incorporated village, constituting a separate road district, exempt from the supervision and control of the commissioners of highways of the town, and from payment of any tax for the salary or fees of said commissioners, and from payment of any tax for the opening, erection, maintenance and repair of any highway or bridge of said town, without the limits of said village, no residents of such village shall vote at any biennial or special election in such town for any commissioner of highways for said town, nor for or against any appropriation for the opening, laying out, maintenance, erection or repair of any highway or bridge in said town, without the limits of said village. At the biennial elections in such towns, the names of candidates for the office of highway commissioner shall be printed on a different ballot from the one containing the names of candidates for other town officers. Such ballot shall be indorsed "commissioner of highways," and shall be deposited, when voted, in a separate ballot-box, which also shall be marked "commissioner of highways." Such ballots and ballot-box shall be furnished by the officers now charged by law with that duty at town elections. A poll list shall be kept by the clerk of the meeting on which shall be entered the name of each person voting by ballot."

This section of the Town Law does not apply to a village which constitutes under the law a separate highway district, unless it is also exempt from highway taxes for the payment of the salary of a town superintendent or for the maintenance and repair of bridges. It is only in special cases, by the village charter, that such villages are so exempt. It is not sufficient that the village be exempt from taxes for the ordinary repair and improvement of highways, as provided in section 99 of this chapter, *post*, but they must also be exempt from charges and expenses connected with the salary of superintendents and the repair and maintenance of bridges.

It was held under former section 53 of the former Highway Law that notwithstanding the exemption contained therein all incorporated villages exempt from taxation imposed for the maintenance and repair of the highways lying outside of the villages, with residents of villages, could vote upon a proposition for the issue of bonds for the construction and repair of highways and bridges. *Matter of Shapter v. Carroll*, 18 App. Div. 390, 46 N. Y. Supp. 202 (1897). Electors in villages incorporated under the General Village Law may vote for highway commissioners and are eligible to such offices. *Opinion of Attorney-General, 1898, page 104.*

**§ 41. Submission of proposition for appointment of town superintendent.**—Upon the written request of twenty-five taxpayers of any town, made and filed as provided in the town law, the electors thereof may, at a special or biennial town meeting, vote by ballot upon a proposition providing for the appointment of a town superintendent in such town. Such proposition shall be submitted in the manner provided by law for the submission of questions or propositions at a town meeting. If such proposition be adopted, the town board of the town shall, upon the expiration of the term of office of the elected town superintendent, appoint a town superintendent therefor, who shall take and hold office for the term hereinafter prescribed.

**Derivation.** This section is new.

**When proposition to take effect.** If a proposition providing for the appointment of a town superintendent is adopted at a special town meeting the successor of the town superintendent in office at the time the proposition is voted upon shall be appointed by the town board. If such proposition is adopted at a biennial town meeting, and at the same town meeting a town superintendent is elected, the town superintendent should be permitted to serve for the term for which he was elected, and upon the expiration of such term the town board is authorized to appoint his successor.

**Submission of proposition.** The application for the submission of a proposition under this section must be filed with the town clerk at least twenty days before the town meeting. The application must be in writing and must plainly state the question to be voted upon. Town Law, § 32. The form of the application for the submission of such a proposition may be as follows:

## FORM No. 2.

## Application for Submission of Proposition for Appointment of Town Superintendent.

To A. F., Town Clerk of the Town of \_\_\_\_\_, County of \_\_\_\_\_ :

The undersigned, taxpayers of the town of \_\_\_\_\_, hereby make application, pursuant to the provisions of section 41 of the Highway Law, and section 32 of the Town Law, for the submission of a proposition to be voted upon by ballot at the biennial [or a special town meeting duly called therefor] to be held in the town of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, for the following purpose and in the following form:

*Resolved*, That the town superintendent of highways of the town of \_\_\_\_\_, shall be appointed by the town board of such town as provided in section 41 of the Highway Law, upon the expiration of the term of office of the town superintendent of highways elected at the biennial town meeting held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

And such applicants hereby request that a vote be taken upon such proposition at such town meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of taxpayer.]

**Special town meeting.** If a special town meeting is to be held for the consideration of such a proposition, written application must be made to the town clerk, signed by at least twenty-five taxpayers upon the last town assessment-roll; upon the filing of such application it is the duty of the town clerk to give at least twenty days' notice of the holding of a special town meeting. Such notices are to be posted conspicuously in at least four public places in the town "and to be published once in each week for two consecutive weeks immediately prior to such special town meeting in two newspapers published in such town; if there be but one newspaper published in such town then in such newspaper and in the newspaper, published in the county, having the largest circulation in such town, or if there be no newspaper published in such town then in the two newspapers, published in the county, having the largest circulation in such town; which notices shall specify the time, place and purposes of the meeting." Town Law, § 24, as amended by L. 1907, chap. 363.

For more extended discussion of requirements as to the holding of special town meetings, and the submission of proposition at biennial and special town meetings, see Gilbert's Town and County Officers' Manual, pages 196-224.

The application for a special town meeting and the notices of such town meeting may be in the following forms:

## FORM No. 3.

## Application for Special Town Meeting to Vote on Appointment of Town Superintendent.

To A. F., Town Clerk of the town of \_\_\_\_\_, county of \_\_\_\_\_ :

The undersigned, taxpayers of said town, whose names appear on the last assessment-roll thereof, hereby make application to, and require you to call a special town meeting of the electors of such town, pursuant to section 23

of the Town Law, for the purpose of voting by ballot upon the following proposition: [State proposition as in Form No. 2.]

Dated this                    day of                    , 19 .

[Signatures of at least twenty-five taxpayers.]

#### FORM No. 4.

##### Notice of Special Town Meeting.

*Notice is hereby given* that, pursuant to an application made therefor as prescribed by statute, a special town meeting of the qualified electors of the town of                    , county of                    , will be held at                    , in the village of                    , on the day of                    , 19                    , at                    o'clock in the                    noon for the purpose of voting by ballot upon the following proposition: [State proposition as in Form No. 2], and for the transaction of such other business as may lawfully be brought before such meeting.

Dated this                    day of                    , 19 .

A. F.,

*Town Clerk, Town of*                    .

#### FORM No. 5.

##### Notice of Submission of Proposition for Appointment of Town Superintendent.

*Notice is hereby given* that, pursuant to an application made therefor as prescribed by section 41 of the Highway Law, which application was filed in the office of the town clerk of the town of                    , on the                    day of                    , 19                    , the following proposition will be submitted to be voted upon by ballot at the biennial town meeting [or at a special town meeting duly called therefor] to be held in the town of                    , on the day of                    , 19                    , to-wit: [State proposition as in Form No. 2.]

Dated this                    day of                    , 19 .

A. F.,

*Town Clerk, Town of*                    .

§ 42. **Term of office of town superintendent.**—The term of office of a town superintendent elected or appointed, as provided in this article, shall be two years. If such town superintendent be elected at a town meeting held at the time of a general election, his term shall begin on the Thursday succeeding his election, or as soon thereafter as he shall have been officially notified of his election and shall have duly qualified. If such town superintendent shall have been elected at a town meeting held at any other time, his term of office shall begin on the first day of November succeeding his election. If such town superintendent shall have been appointed pursuant to a proposition adopted, as provided in the preceding section, his term shall likewise begin on the first day of November, and the town board shall meet prior to that day, for the appointment of such town superintendent.

**Derivation.** This section is new in the present highway law. Town Law, § 13, as amended by L. 1901, chap. 391, provides that the term of office of highway commissioners shall be two years, beginning in towns where town



meetings are held on general election day, on January first after their election, and in other towns immediately upon their election.

**Object of section.** The purpose of this section is to have the town superintendent take office as near as practicable to the commencement of the town fiscal year, which under the scheme of this law is November first. The report of the joint legislative committee shows that this date was selected because the annual audit day in all but three of the fifty-eight counties of the State having town governments is the Thursday succeeding general election day. It was therefor regarded wise that the town superintendent should take office as near as possible to the day when his predecessor had closed his accounts for the year, which is also the time when the supervisor of the town renders his report to the town board of the entire expenditures for highway and bridge purposes for the preceding twelve months. See § 107, *post*.

**Beginning of term.** Under the above section the term of office of a town superintendent elected at a town meeting held on general election day is to begin on the Thursday succeeding his election, or as soon thereafter as he shall have been officially notified of his election and shall have duly qualified.

Where town meetings are held at the time of the general election the justices of the peace and the town clerk meet on the Thursday succeeding election day as a board of canvassers, and canvass the votes cast for town officers at such election. Town Law, § 42. Upon the completion of the canvass they declare elected those persons who received the highest number of votes, and enter the results at length in the minutes of the proceedings of the board "and within ten days thereafter transmit to any person elected to a town office whose name is not on the poll-list as a voter, a notice of his election." See Town Law, §§ 37 and 38.

It is intended by the statute that a public declaration by the town clerk as to the result of the canvass of the votes cast for a town superintendent of highways, shall be a sufficient certificate and evidence of his election. *Matter of Baker*, 11 How. Pr. 418 (1855); *Matter of Case v. Campbell*, 16 Abb. N. C. 270 (1883). No formal notification is required to be made unless he is not on the poll-list as a voter. This is the general rule, although there are some counties holding town meetings under special acts where the votes for town officers are canvassed by boards of supervisors and formal notices of election are transmitted to the persons declared to be elected.

Qualification consists in taking the oath of office and giving the required security. The act of qualification must be completed within ten days after the declaration of the result of the canvass by town canvassers, or within ten days after the town superintendent shall have received the notice transmitted to him by the county board of canvassers, in those counties where the votes for town officers are so canvassed. It will thus appear that the term of office of a town superintendent elected at a town meeting held on general election day will begin as soon after the meeting of the town board of canvassers on the Thursday succeeding election day, as such superintendent takes and files his oath of office and undertaking.

If a town superintendent is elected at any other time than at a general election, or if he be appointed as provided in section 42, his term of office begins on the first day of November.

**Holding over after expiration of term.** Where a town superintendent of highways has duly entered upon the duties of his office, he shall, unless the office shall terminate and be abolished, hold over and continue to discharge

the duties of his office after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over shall be for the residue of the term only. Public Officers Law, § 5.

Except for the authority conferred by this section a town superintendent of highways would not be permitted to hold his office after the expiration of his term. *People v. Tieman*, 30 Barb. 193 (1859).

The term "qualified" as used in this section of the Public Officers Law means to take an oath of office and to file an official undertaking as required by law. *People ex rel. Williamson v. McKinney*, 52 N. Y. 374, 380 (1873).

Until a town superintendent takes the oath and files his bond he is not qualified within the meaning of this section, and the incumbent of the office is entitled to hold over.

**Delivery of books and papers by outgoing town superintendents of highways to successors.** Section 84 of the Town Law provides that "whenever the term of office of any supervisor, town clerk, commissioner of highways [town superintendent of highways] or overseer of the poor shall expire, or when either of such officers shall resign, and another person shall be elected or appointed to the office, the succeeding officer shall, immediately after he shall have entered on the duties of his office, demand of his predecessor all the records, books and papers under his control belonging to such office. Every person so going out of office, whenever so required, shall deliver upon oath to his successor all the records, books and papers in his possession or under his control belonging to the office held by him, which oath may be administered by the officer to whom such delivery shall be made, and shall, at the same time pay over to his successor the moneys belonging to the town remaining in his hands. If any such officers shall have died, the successors or successor of such officer shall make such demand of the executors or administrators of such deceased officer, and such executors or administrators shall deliver, upon the like oath, all records, books and papers in their possession, or under their control, belonging to the office held by their testator or intestate. If any person so going out of office, or his executors or administrators, shall refuse or neglect, when lawfully required, to deliver such records, books or papers, he shall forfeit to the town, for every such refusal or neglect, the sum of two hundred and fifty dollars; and officers entitled to demand such records, books and papers may compel the delivery thereof in the manner prescribed by law." Proceedings to compel delivery of books and papers by public officer to his successor are contained in the Code of Civil Procedure, § 2471a. It has been held in proceedings to compel an officer whose term has expired to deliver to his successor the books, papers, etc., appertaining to the office that all that petition is required to establish is his election, and that he has duly qualified, questions as to the validity of the election may not be determined in such a proceeding. *Matter of Bradley*, 141 N. Y. 527 (1894).

§ 43. **Vacancies; office of highway commissioner abolished.**—Vacancies in the office of town superintendent shall be filled for the balance of the unexpired term. The office of highway com-

missioner in each town is hereby abolished, to take effect on and after November first, nineteen hundred and nine. Where the office of highway commissioner shall become vacant by expiration of term or otherwise, after the taking effect of this chapter, and prior to the said first day of November, nineteen hundred and nine, such vacancies shall be filled for a term to expire on such date. Highway commissioners in office when this chapter or any section hereof takes effect shall exercise the powers and perform the duties hereby conferred and imposed upon town superintendents until the said first day of November, nineteen hundred and nine, and until their successors shall have duly qualified, whereupon such powers and duties shall cease and determine.

**Derivation.** This section is new.

**Time of taking effect.** Under section 317, subdivision 1, it is provided that the provisions of section 43 shall take effect immediately (May 19, 1908) so that highway commissioners in office at the present time are authorized to exercise the powers and perform the duties conferred upon town superintendents of highways by the provisions of sections 90, 91, 94, 95, 99 and 100, relating to estimates of expenditures, duties of the town boards in respect thereto, levy of taxes, etc.

**Office of highway commissioner abolished.** Highway commissioners in office when this act or any part thereof takes effect are to continue in the performance of the duties imposed upon town superintendents by this act until November 1, 1909, whereupon such office is abolished, and the town superintendents elected or appointed as provided in this law will take office.

**Highway commissioners continue in office until their successors shall have duly qualified,** whereupon the powers and duties of such officers shall cease and determine. This language meets the situation which would otherwise arise in counties where, under special acts, the town officers are elected at the annual November election, and by the terms of said acts, boards of supervisors acting as boards of canvassers also canvass the returns for town officers in such counties, and where, therefore, the certificate of election cannot be issued with the same promptness as in counties where the town boards act as the canvassing board for town officers. It was the intention of the committee and the Legislature to harmonize by amendment these special acts so that in all towns of the State the town superintendent would be in possession of his certificate of election within forty-eight hours after the election was held. But owing to the late date in the session when the law was passed it was one of the matters necessarily left to be considered at the coming session. To provide for this contingency the language above cited in respect to the continuance of highway commissioners in office was inserted.

**Vacancies.** *a. Creation of vacancies.* Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof: (1) his death; (2) his resignation; (3) his removal from office; (4) his ceasing to be an inhabitant of the town; (5) his conviction of a felony or a crime involving a violation of his oath of office; (6) the judgment of a court declaring void his election or appointment, or that his office is forfeited or vacant; (7) his refusal or neglect to file his official oath or

undertaking, if one is required, before or within fifteen days after the commencement of the term of office for which he is chosen, or if appointed to fill a vacancy within fifteen days after the notice of his appointment, or within fifteen days after the commencement of such term or to file a renewal undertaking within the time required by law, or if no time be so specified, within fifteen days after notice to him in pursuance of law, that such renewal undertaking is required. (Public Officers' Law, § 20.)

*b. Forfeiture of office for certain acts.* A town superintendent of highways who is convicted of purchasing votes at the election at which he was elected forfeits his office. Penal Code, § 41-o. If he receives or agrees to receive a bribe upon an agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, he is punishable by imprisonment in a State prison not exceeding ten years or by a fine not exceeding five thousand dollars or by both; and in addition thereto forfeits his office. Penal Code § 45. He also forfeits his office if he asks or receives or agrees to receive any gratuity or reward for appointing a person to an office. Penal Code, § 53. So also he forfeits his office if he is convicted of permitting any person for any reward or consideration to perform any of his official duties. Penal Code, § 54. If he is convicted of willfully auditing or paying or consenting to the audit or payment of a false or fraudulent payment against the town he will also forfeit his office. Penal Code, § 166.

*c. Vacancy caused by non-residence.* The office of town superintendent of highways will become vacant upon the officer ceasing to be a resident of the town for which he was elected or appointed. *People v. Board of Education*, 1 Den. 647 (1845); *People v. Hull*, 47 N. Y. St. Rep. 94 (1892).

*d. Appointment to fill vacancies.* When a vacancy shall occur or exist in the office of town superintendent of highways, the town board or a majority of them may, by an instrument under their hands and seal appoint a suitable person to fill the vacancy, and the person appointed shall hold the office until the next biennial town meeting. The board making the appointment shall cause the same to be forthwith filed in the office of the town clerk who shall forthwith give notice to the person appointed. Town Law, § 65, as amended by L. 1897, chap. 481.

It will be noticed that if there is a vacancy in the office of highway commissioner after the taking effect of this chapter, such vacancy must be filled for a term to expire on the first day of November, 1909.

A special town meeting cannot be called for the filling of a vacancy in the office of a town superintendent of highways. *People ex rel. Hyde v. Potter*, 82 N. Y. Supp. 649 (1903).

*Resignation of town superintendent.* Any three justices of the peace of a town may, for sufficient cause shown to them, accept the resignation of any town officer of their town; and whenever they shall accept any such resignation, they shall forthwith give notice thereof to the town clerk of the town. Town Law, § 64.

Section 21 of the Public Officers' Law also provides that a town officer may resign his office to the town clerk. So far as this section is inconsistent with section 64 of the Town Law, the latter section will control so that the proper procedure would be for a town superintendent to present his resignation to the justices of the peace. Public Officers' Law, § 21 also provides that, if the resignation "be addressed to an officer it shall take effect upon the delivery

to him at his place of business or when it shall be filed in his office." This provision would make a resignation of a town superintendent take effect from the time of its delivery to the justices of the peace, rather than from the time of its acceptance by them.

**Form of resignation.** Resignation of a town superintendent of highways, made as provided in section 64 of the Town Law, and the acceptance thereof, may be in the following form:

**FORM No. 6.**

**Resignation of Town Superintendent.**

To ..... justices of the peace of the town of .....  
 ....., county of .....

The undersigned, who was duly elected [or appointed] to the office of town superintendent of highways of the town of....., county of ..... , on the ..... day of ....., 19...., and duly qualified as such officer as provided by law, do hereby resign such office for the following reasons [state reasons.]

Dated, this ..... day of ....., 19....

[Signature of town superintendent.]

**FORM No. 7.**

**Notice of Acceptance of Resignation.**

To A. F., town clerk of the town of....., county of .....

You are hereby notified, pursuant to section 64 of the Town Law that we, the undersigned, justices of the peace of the town of ..... have, for good cause, accepted the resignation of ....., as town superintendent of highways of said town.

Dated, this .....day of ....., 19....

[Signatures of three justices of the peace.]

In making an appointment to fill a vacancy in the office of town superintendent of highways the following forms may be used.

**FORM No. 8.**

**Appointment to Fill a Vacancy.**

Whereas a vacancy exists in the office of town superintendent of highways of the town of ....., county of .....4....., caused by the resignation [or other cause] of ....., who was elected [or appointed] to such office on the ..... day of ....., 19...., for a term of two years from the ..... day of ....., 19....;

Now, therefore, we, the undersigned members of the town boards of such town, in pursuance of the power vested in us by section 65 of the Town Law, do hereby appoint ....., of said town to fill the vacancy existing in such office of town superintendent of highways, and to hold such office for the balance of the unexpired term of the said..... or until his successor is elected [or appointed] and has qualified, as provided by law.

In witness whereof we have hereunto set our hands and seals at.....  
 ..... in said town, on the ..... day of ....., 19....

[Signatures of majority of members of town board.]

## FORM No. 9.

## Notice of Appointment to Office of Town Superintendent.

To .....

You are hereby notified that you were appointed by the town board of the town of ....., county of ....., as town superintendent of highways in and for the said town, to fill the vacancy in that office caused by the resignation [or state other cause] of....., the former incumbent of that office. Such office is to be held by you for the balance of unexpired term of the said ....., or until your successor shall have been duly elected [or appointed] and shall have qualified as provided by law. Such appointment was duly executed by a majority of the members of such town board, and filed in my office on the ..... day ....., 19...., as provided by law.

Dated, this ..... day of....., 19....

A. F.,

Town clerk, town of .....

§ 44. **Deputy town superintendent.**—The town board of a town may, in its discretion, upon the written recommendation of the town superintendent, appoint a deputy town superintendent, to be nominated by such town superintendent, to assist him in the performance of his duties. Such deputy superintendent shall act as such during the pleasure of the town superintendent.

**Derivation.** This section is new. It was thought that a deputy town superintendent might be required to act for the town superintendent in towns so large that it would be impossible or inconvenient for the town superintendent to cover all the roads thereof.

§ 45. **Compensation of town superintendent and deputy.**—The town board shall fix the compensation of such superintendent and his deputy, if one be appointed, which shall not be less than two nor more than five dollars per day. Such town superintendent and his deputy, if any, shall be paid the actual and necessary expenses incurred by them in the performance of their duties. Such compensation may be paid by the supervisor monthly, in advance of audit, from moneys levied and collected for such purpose, on accounts duly verified in the same manner as town accounts are required by law to be verified. Such accounts for compensation, together with accounts for expenses incurred by such town superintendent and his deputy, if any, verified as above provided, shall be subject to audit by the town board at its meeting held annually for the audit of accounts of town officers, and the balance due, as finally audited by the town board, shall be paid by the supervisor to such town superintendent, or deputy, if any, from funds available therefor.

**Derivation.** This section is partially new.

By section 178 of the Town Law, as amended by L. 1904, chap. 312, it was provided that the town board of any town may, at a regular meeting, fix the compensation of the commissioner of highways at a sum not less than two nor more than three dollars per day. The maximum is raised by this act so that the town board may fix the compensation of the commissioner at not less than two nor more than five dollars per day.

**Payment of compensation.** The supervisor may, under this section, pay the compensation of the town superintendent and his deputy, if any, at the end of each month. The town superintendent, or deputy, is then required to submit a verified and itemized account of his claim for compensation, together with credits of payment made by the supervisor, and the town board is required, at its meeting for the audit of accounts of town officers, to consider the accounts of the town superintendent or deputy, and audit the same at the amount which may be found to be due, as compensation. The meeting of the town board here referred to is the one provided for by section 161 of the Town Law, which is held on the Tuesday preceding the biennial town meeting and on the corresponding day in each alternate year, in towns wherein town meetings are held at any other time than a general election; and in towns where such meetings are held on election day the meeting is held on the twenty-eighth day of December in each year, or on the day preceding, when such day falls on Sunday.

**State and county highways.** The compensation of town superintendents for services in respect to the maintenance and repair of State and county highways is fixed by the commission and is paid from moneys set apart as provided in article 7 for such maintenance and repair. See section 175, *post*.

§ 46. **Removal of town superintendent.**— A town superintendent may be removed by the town board upon written charges preferred by the commission, or by the district or county superintendent, for malfeasance or misfeasance in office. Such charges shall be presented in duplicate to the town clerk, one of which shall be filed in his office, and the other shall be served by him personally upon the town superintendent, together with a notice directing him to appear before the town board at a time and place stated therein. Such service shall be made at least five days prior to the time specified in such notice. The town board shall convene for the purpose of considering such charges within ten days after the filing thereof with the town clerk. The town board shall hear evidence in support and in defense of such charges and after such hearing shall enter an order in the office of the town clerk either sustaining or dismissing such charges. The entry of an order sustaining the charges shall operate as a removal and the town board shall appoint another person to fill the vacancy caused thereby. The person so appointed shall hold office for the unexpired term or until the entry of a final order of a court of competent jurisdiction determining that the original town superintendent was wrongfully and illegally removed and directing

his reinstatement. If the charges are dismissed, the town board shall notify the commission and the district or county superintendent of such fact. The town board shall also notify the commission and the district or county superintendent of the name of the person appointed to fill the vacancy caused by the removal of such town superintendent. An appeal may be taken by the commission or district or county superintendent, or by the town superintendent, from the order of the town board, to the county court by the filing of a notice of such appeal in the office of the town clerk within thirty days after the entry of such order. A copy of such notice of appeal shall be served personally or by mail upon the adverse party. Upon such appeal the county court shall consider the charges presented to the town board, and may hear evidence in support and in defense thereof. After such hearing the court shall make an order either affirming or reversing the order of the town board. A copy of such order shall be entered in the office of the town clerk. If the order reverse an order dismissing the charges, it shall direct the town board to remove the town superintendent and appoint a person to fill the vacancy caused thereby, within the time specified therein; if it reverse an order sustaining such charges, it shall direct the reinstatement of the town superintendent removed, to take effect upon the filing of the copy in said town clerk's office.

**Derivation.** The procedure here outlined for the removal of the town superintendent is new. It was intended to provide an additional and more speedy procedure than the one now given in the Public Officers Law.

**Removal by Supreme Court.** A town superintendent of highways may be removed from office by the Supreme Court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen, resident of the town, and shall be made to the Appellate Division of the Supreme Court held within the judicial department embracing such town. Such application shall be made upon notice to such town officer of not less than eight days, and a copy of the charges upon which the application will be made must be served with such notice. Public Officers Law, § 25a, as added by L. 1897, chap. 573.

The removal proceedings authorized by the above section of the Highway Law are to be instituted by the commission or by the district or county superintendent, and may not be instituted by a citizen. If a citizen wishes to bring about the removal of a town superintendent, he must proceed as authorized by the Public Officers Law.

§ 47. **General powers and duties of town superintendent.**—The town superintendent shall, subject to the rules and regulations of the commission, made and adopted as provided in this chapter:

1. Have the care and superintendence of the highways and



bridges in the town except as otherwise specially provided in relation to incorporated villages, cities and other localities.

**Derivation.** This subdivision is derived from the first clause of section 4 of the former Highway Law.

**Village highways.** The exception in this subdivision as to highways in incorporated villages has reference to the fact that by section 141 of the Village Law, it is provided that "the streets and public grounds of a village, except as provided in the next section, are under the exclusive control and supervision of the board of trustees." Similar provisions are found in special village charters.

**Bridges in villages.** It is provided in section 142 of the Village Law that "if at the time this chapter takes effect, the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control under this chapter. In any other case, every public bridge within a village shall be under the control of the commissioners of highways of the town in which the bridge is wholly or partly situated, or such other officer as may be designated by special law, and the expense of constructing and repairing such bridge and the approaches thereto is a town charge, unless the village assumes the whole or part of such expense."

It is also provided in section 143 of the Village Law that "A village may assume the control, care and maintenance of a bridge or bridges wholly within its boundaries, upon the adoption of a proposition therefor, at a village election; or a proposition may be adopted authorizing the board of trustees to enter into an agreement with the commissioners of highways of a town, in which any part of such village is situated, to construct or repair a bridge in any part of the village included in such town, at the joint expense of the village, and town, which agreement shall fix the portion to be paid by each."

**Rules and regulations.** The State commission of highways is authorized by section 15, subdivision 2, *ante*, p. 15, to prescribe rules and regulations not inconsistent with law, fixing the duties of town superintendents in respect to highways and bridges composing the State and county systems. The commission is not authorized to make rules in respect to town highways and bridges.

**Maintenance of State and county highways.** While the maintenance and repair of State and county highways is under the direct supervision and control of the State commission, the work is to be performed either by the town, district or county superintendents, provided the commission considers that a proper performance of such work may be thus secured. See section 170, *post*.

**Care and superintendence of town highways.** It is not intended by this new law to limit the powers and duties of town officers in respect to town highways. The office of town superintendent is continued with the powers and duties in respect to such highways formerly belonging to the office of highway commissioner, modified only so far as is necessary to carry out the new method of administering highway moneys. The State organization, consisting of commissioners, engineers and district superintendents are available as aids to the town superintendents, but none of these officers may intervene to lessen the responsibility of the town officers for the proper maintenance of the town highway system. The State commission and district or county superintendents may insist that the town superintendents perform

their statutory duties, and a failure may be a ground for removal proceedings under section 46. Reports respecting highway conditions are required, and the commission may direct the use of uniform methods of expending and accounting for highway moneys. All of these statutory requirements are for the purpose of securing the adoption and application throughout the State of appropriate and efficient methods of highway construction and maintenance. But they are not for the purpose of transferring any of the powers and duties of the local officers in respect to those highways which constitute the town system.

District or county superintendents are required by section 33, subdivision 1, *ante*, p. 24, to have "general supervision of the work of constructing, improving and repairing bridges and town highways." This is for the purpose of vesting in such officers the power of seeing that the town superintendents perform their duties as prescribed by law. The district or county superintendents are also required to aid the town superintendents in the maintenance and improvement of town highways and bridges (section 33, subdivision 2, *ante*, p. 24). They also approve plans, specifications and estimates for the construction and maintenance of town highways, where the work is to be done by contract (section 33, subdivision 5, *ante*, p. 24). Plans for bridges are to be prepared by the engineers employed by the commission when requested so to do by the town superintendents.

**What are highways.** For definition of highways, see section 2, *ante*, p. 5. The note to that section contains a statement of what constitutes a highway within the meaning of that term as commonly used. As to highways by use, see section 209, *post*.

**Powers and duties generally.** The town superintendent is vested with general control over the public highways and he has a duty to perform toward the public in connection with their proper maintenance. *Matter of the Application of R. E. R. Co.*, 123 N. Y. 351, 33 N. Y. St. Rep. 695 (1890). In the administration of the highway system, he is an independent public officer, exercising power and charged with public duties, specially prescribed by law, and as such acts individually of any direction on the part of the town; on the other hand he is without power to represent or affect the rights of the town in any other manner than as prescribed by statute. *Flynn v. Hurd*, 118 N. Y. 19; *People ex rel. Everett v. Supervisors*, 93 N. Y. 397; *Mather v. Crawford*, 36 Barb. 564. He is not an agent of the town in its corporate capacity, and the town is not chargeable for his non-feasance or misfeasance, nor for his official acts or delinquencies, except where made so by special provision of law. *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310 (1878); *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *Morey v. Town of Newfane*, 8 Barb. 645 (1850); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891), 37 N. Y. St. Rep. 135. But see *Bartlett v. Crozier*, 17 Johns. 439 (1820). In the case of *Morey v. Town of Newfane*, *supra*, commissioners of highways themselves were declared to be a species of *quasi* corporations, with power to sue and be sued—having legal succession, and deriving all their authority, not through the towns, but directly from the statute.

The town superintendent is charged with the care and superintendence of the highways as well as with directing their reparation; and the former may not be discharged by the performance of the latter; and in discharging both

such duties he must exercise reasonable diligence and vigilance which may not be disposed of by the delegation of the duty to a road overseer or any other party. *Farman v. The Town of Ellington*, 46 Hun, 41 (1887), *affd.*, 124 N. Y. 662; *Gould v. Glass*, 19 Barb. 179 (1855).

It is to be assumed that in the exercise of his official functions the town superintendent has acted in good faith, and therefore, according to the best of his judgment, unless the contrary appears. This is the rule applicable to officers clothed with discretionary or judicial powers. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894); *People v. Crouse*, 51 Hun, 494, 4 N. Y. Supp. 266 (1889); *Harriman v. Howe*, 78 Hun, 280, 28 N. Y. Supp. 858 (1894).

Town superintendents have no control over the location of a railroad within the line of a highway of the town (see *Railroad Law*, § 11, *post*). That power is vested in the corporation subject to the approval of the Supreme Court; and though the statute requires that he be notified of the application to the court, his consent to the location is not required, and if given would confer no additional power on the company. *Post v. W. S. Railroad Co.*, 123 N. Y. 580 (1890).

Town superintendents of highways act in laying out highways under a special and statutory authority, and it must appear upon the face of their proceedings, or by proof *abunde*, that they acquired jurisdiction in the particular case, and a record, purporting to be a record of the highway laid out by them, which fails to show affirmatively that such jurisdiction was acquired, cannot be helped out by intentment or presumption. *Miller v. Brown*, 56 N. Y. 383 (1874); *People ex rel. Babcock v. Commissioners of Plainfield*, 7 How. Pr. 27 (1852).

In the case of *Snowden v. Town of Somerset*, 52 App. Div. 84, 64 N. Y. Supp. 1088 (1900), reversed on other grounds, 171 N. Y. 99, it was held that a town never had any right to lay out, alter, discontinue, improve or repair a highway; but that those are duties of the commissioner [town superintendent], and the town has no authority over him in their performance, and he is not its agent in so doing. See *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895).

A town superintendent is not an agent of the town with authority to contract for it in real or supposed emergencies, and cannot make a contract binding upon the town unless specifically authorized by statute. For instance, it was held under the former law that where a commissioner, with the consent of the town board, enters into a written contract for the rebuilding of a bridge at a cost exceeding \$500, he cannot of his own accord enter into an independent contract for the supervision of the work, without the consent of the town board, although the amount involved is less than \$500. The town in such a case is not bound whatever the amount, unless the town board has consented to the contract. *People ex rel. Morey v. Town Board*, 175 N. Y. 394, reversing 80 App. Div. 280, 80 N. Y. Supp. 309 (1903). As to legality of orders made by town superintendents, see *Van Bergen v. Bradley*, 36 N. Y. 316 (1867); *Engleman v. Longhorst*, 120 N. Y. 332 (1890), 31 N. Y. St. Rep. 29. For improper joinder of town superintendent, see *Town of Palatine v. Canajoharie W. S. Co.*, 90 App. Div. 548, 86 N. Y. Supp. 412 (1904); *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898).

**Duties in respect to plank-roads.** A road appropriated by a plank-road corporation for the purpose of a toll-road does not cease to be a highway; the general right of the public to use it for the purpose of travel remains unimpaired. Local authorities are not ousted of their jurisdiction, in the particulars in which their exercise would not conflict with the purposes or with the rights of the plank-road company, and which the public interests require should be exercised; and especially are they not relieved from their duties in respect to encroachments upon highways, which are at the same time used as plank-roads. *Walker v. Caywood*, 31 N. Y. 51 (1865); *Estes v. Kelsey*, 8 Wend. 555 (1832).

**2. Cause such highways and bridges to be kept in repair, and free from obstructions caused by snow and give the necessary directions therefor, and inspect the highways and bridges within the town, during the months of April and October of each year, or at such other time as the district or county superintendent may prescribe.**

**Derivation.** This subdivision is taken from the first sentence of former Highway Law, § 4, subd. 1. Under the former law the inspection was made annually between the first and fifteenth day of September in each year, "or at such other time as the board of supervisors by resolution may prescribe."

**Obstructions caused by snow.** The duty of keeping highways free from obstructions caused by snow is made by this subdivision as obligatory upon the town superintendent as keeping them in repair.

By subdivision 4 of this section he has authority to employ the necessary men, teams and implements for such purpose. He is required to estimate each year the amount necessary to be levied and collected for the removal of such obstructions (section 90, subdivision 4, *post*), and whenever the sum of \$1,000 is insufficient therefor the town board and town superintendent may call a special town meeting to vote upon a proposition to raise such additional sum as they may deem necessary (section 92, *post*).

Section 54, *post*, provides for the removal of obstructions within the highway causing the drifting of snow, either by the owner of abutting lands, or, in case of his failure, by the town superintendent at the expense of the owner. Wire fences may be supplied by the town superintendent at the expense of the town, to displace fences which cause the snow to drift within the highway. See section 56, *post*. It is the duty of the town superintendent to keep the highways in proper condition and repair, and when there is any money in his hands it should be expended in keeping the roads open in the winter. Report of Attorney-General (1903), 257.

**Repair of bridges.** The expense of constructing and repairing bridges within the bounds of the town is chargeable to the town. See section 250, *post*. As to the repair of bridges over streams, constituting town boundaries, see sections 254-262, *post*. As to duties of boards of supervisors in respect to bridges, see County Law, §§ 61-68, *post*.

**Contract for repairs.** It is provided in section 48, *post*, that the permanent improvement of an existing town highway, the cost of which will exceed \$500 shall be done under contract. The Attorney-General, in 1900 held

that a resolution adopted by a town meeting providing that the work of preparing and maintaining a highway should be let upon contract to the lowest bidder was not authorized by law and was not binding upon the commissioner of highways. Report of Attorney-General (1900), 137. This ruling is equally applicable under the present law; the only authority to provide for the performance of highway work by contract is that conferred by section 48, *post*.

**Failure to repair.** As to what constitutes negligence on the part of the town superintendent in failing to repair defective highways and bridges, see section 74 and notes thereunder. As to liability of town superintendent for neglect in making repairs to highways and bridges, see section 75, *post*.

**Origin of duty to repair.** By the law of England the duty of keeping roads in repair devolved upon the parishes; this obligation was absolute irrespective of any resource or means available for the purpose; this obligation was a common-law one and not the result of positive enactment. But this obligation has not been inherited by the towns in this State by reason of the difference in the origin and character of the English parish and the American town, the former being primarily ecclesiastical and the latter exclusively political. The former is of common-law origin and the latter the result of statutory enactment. It is true that in New England the town is liable for injuries resulting from neglect to keep highways in repair, but this is not a common-law liability, but is the result of statutory enactment. *Bartlett v. Crozier*, 17 Johnson, 439 (1820); *Morey v. Town of Newfane*, 8 Barb. 645 (1850); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895).

**Common-law duty to repair bridges.** The repair of bridges at common law, that is, those without cities or incorporated towns, belonged to the county; and the remedy was not by suit against the surveyors, whose duty it was to repair bridges, or against the justices, but by indictment against the county. But the common-law rule has never been adopted in this State. *Bartlett v. Crozier*, 17 Johns. 439 (1820); *Hill v. Supervisors of Livingston*, 12 N. Y. 52 (1854).

**Duty of the town superintendent to keep highways and bridges in repair.** The town superintendent is powerless to hurden the town he represents for the repair of highways and bridges beyond statutory limitations. *Flynn v. Hurd*, 118 N. Y. 19 (1889); *People ex rel. Everett v. Board of Supervisors*, 93 N. Y. 397 (1883). No other officers are by enactment charged with such duty. *Berlin Iron Bridge Co. v. Wagner*, 57 Hun, 346, 10 N. Y. Supp. 840 (1890). Neither the Town Law nor the Highway Law has changed the old rule that he cannot create any liability upon the part of his town to pay for materials ordered by him for the ordinary repair of town highways. *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900); *Van Alstyne v. Friday*, 41 N. Y. 174 (1869); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895). If the reparation made by the town superintendent is the product of his judgment he does not exceed the consent granted him by the town board; and mandamus will lie on its refusal to audit a claim so incurred by him. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894). By fair implication the power to repair a bridge may include the power to build a new one as well as to repair an old one where such action is necessary to keep the highway passable. *Huggans v. Riley*,

125 N. Y. 88 (1890); *Mather v. Crawford*, 36 Barb. 564 (1862). He may abate the nuisance of an unsafe bridge by putting it in repair, even though the duty of such repair be primarily in the owner of the land through which the water course runs. *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898). His duty relative to the repair of the sideways are as unlimited as in relation to the most traveled part of the road. *Graves v. Otis*, 2 Hill, 466 (1842).

A town superintendent is not responsible for the repair of highways and bridges situated within an Indian reservation. *Bishop v. Barton*, 2 Hun, 436 (1874).

A defective highway does not necessarily mean one defective in the structure of the repair, but the term is used with regard to their condition for public travel upon them, and the impairment may be the result of an obstruction therein; so held, where the commissioner negligently left a road scraper on the road and plaintiff was injured by a collision at night therewith. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891). For duty to give directions for repair, see *People v. Crounse*, 51 Hun, 489, 494, 4 N. Y. Supp. 269 (1889).

**Liability of highway commissioner for failure to repair.** The earlier cases in this State held that the commissioner was not liable for injuries caused by defects in the highways, the result of their neglect to keep them in proper repair. This holding was founded upon a supposed analogy to the English system of the repair of highways and bridges whereby the officers charged with such duty were not held personally responsible. See *Bartlett v. Crozier*, 17 Johns. 439 (1820); *Garlinghouse v. Jacobs*, 29 N. Y. 297 (1864). Subsequently the court receded from this position in the case of *Robinson v. Chamberlain*, 34 N. Y. 389 (1866), and in the case of *Hover v. Barkhoof*, 44 N. Y. 113 (1870), the liability of the commissioner for such injuries, when resulting from his own negligence, was asserted and established. In the latter case the leading cases of this State and of England are reviewed and the conclusion was reached that one who assumes the duties of a public officer is liable to an individual who sustains such damage through his neglect to perform such duties. See *Ivory v. Town of Deerpark*, 116 N. Y. 476; *Maxin v. Town of Champion*, 50 Hun, 88, 4 N. Y. Supp. 515 (1888), 119 N. Y. 476 (1890); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Clapper v. Town of Waterford*, 131 N. Y. 382, 388 (1892); *Glasier v. Town of Hebron*, 131 N. Y. 447 (1892); *Lane v. Town of Hancock*, 142 N. Y. 510 (1894); *Peck v. Village of Batavia*, 32 Barb. 634 (1860).

By the Act of 1881, chap. 700, which was subsequently revised and re-enacted in sections 16 and 17 of the Highway Law of 1890, the town was made liable for the negligence of the highway commissioner in failing to maintain the highways and bridges in proper repair, and the town was authorized to recover of the commissioner the amount which it was compelled to pay because of his neglect. See sections 74 and 75, *post*.

**Measures of liability.** The duty and liability for a neglect to repair are measured by what the town superintendent may and ought to do with the means at his disposal and furnished to him; and it must be clearly shown that he had the funds or materials, or the power to obtain them, for the purpose of repairing the highway or bridge, and such possession of funds

must be alleged. *Hover v. Barkhoof*, 44 N. Y. 113 (1870); *Eveleigh v. Town of Hounsfield*, 34 Hun, 140 (1884); *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310 (1878); *Morey v. Town of Newfane*, 8 Barb. 645 (1850); *Getty v. Town of Hamlin*, 8 N. Y. Supp. 190 (1889); *Berlin Iron Bridge Co. v. Wagner*, 57 Hun, 346, 15 N. Y. Supp. 596 (1890); *Smith v. Wright*, 27 Barb. 621. (1857); *Peck v. Batavia*, 32 Barb. 634, 641 (1860); *Mather v. Crawford*, 36 Barb. 564 (1862); *People v. Commissioners of Hudson*, 7 Wend. 474, 476 (1831); *Barker v. Loomis*, 6 Hill, 463, 464 (1844); *Garlinghouse v. Jacobs*, 29 N. Y. 297 (1864); *Sutphen v. Town of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128 (1894).

The town superintendent need use only ordinary care, and the town is not liable for consequential damages occasioned to others unless caused by his misconduct, negligence or unskillfulness. *Kerr v. Joslin*, 49 N. Y. St. Rep. 257, 20 N. Y. Supp. 929 (1892). The delegation of the duty of repairing does not relieve the town of liability for the town superintendent's neglect. *Farman v. Town of Ellington*, 46 Hun, 41 (1887), affirmed, 124 N. Y. 662. For particular instances of negligence on the part of the commissioner, see *Kerr v. Joslin*, 49 N. Y. St. Rep. 257, 20 N. Y. Supp. 929 (1892); *Ivory v. Town of Deerpark*, 116 N. Y. 476 (1889); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Sutphen v. Town of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128 (1894).

**Liability of town at common law.** At common law the town was in no way responsible for injuries resulting from defects in the highways; and even after the courts held that the commissioners were subject to such liability, the town was still held exempted, for the commissioner of highways was held not to be an agent of the town in its corporate capacity, and the latter was not chargeable for his nonfeasance or misfeasance or for his official acts or delinquencies. *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310 (1878); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Morey v. Town of Newfane*, 8 Barb. 645 (1850); *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895); *Matter of Certain Freeholders*, 46 Hun, 620 (1887); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895).

**Liability of town as affected by statute.** By the Act of 1881, chapter 700, the town was made liable where the liability for injuries resulting from neglect to keep the highways in repair rested primarily on the highway commissioner. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892). But the liability of the town is commensurate only with that of the commissioner before the passage of the Act of 1881, and to hold the town liable it must be shown that the proximate cause of the injury was an omission of the commissioner to use ordinary care. However, that enactment did not change the powers or duties of the commissioner, and the town is liable only when negligence on the part of the commissioner is clearly shown. *Clapper v. Town of Waterford*, 131 N. Y. 382, 389 (1892); *Robinson v. Town of Fowler*, 80 Hun, 101, 61 N. Y. St. Rep. 791 (1894); *Eveleigh v. Town of Hounsfield*, 34 Hun, 140 (1884); *Lane v. Town of Hanceock*, 142 N. Y. 510 (1894); *Fay v. Town of Lindley*, 11 N. Y. Supp. 355 (1890); *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895). The town in its corporate capacity cannot nor

is it required to repair a highway; that is a function wholly within the jurisdiction of the highway commissioner; nor do the Acts of 1881 and 1890 render it liable for the negligence of the commissioner while engaged in repairing a highway; those statutes merely give a right of action for damages occasioned by a defective highway and do not otherwise enlarge the liability of the town. *Robinson v. Fowler*, 80 Hun; 101, 30 N. Y. Supp. 25 (1894).

A judgment against the highway commissioners is not a judgment against the town. *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883).

These cases are still applicable under the new Highway Law where there has been a neglect on the part of a town superintendent to use due care in repairing town highways and bridges. Other cases relative to the liability of a town for the town superintendent's neglect to repair defects in town highways and bridges are cited under section 74, *post*.

**Extent of repairs.** A highway cannot be said to be open and worked unless it is passable for its entire length. It need not be worked in every part, but it must be worked sufficiently to enable the public to pass and repass with teams and vehicles such as are ordinarily used. The requirement to open and work a highway implies that it must be made passable as a highway for public travel. It need not be a first-class road; it need not be finished, but it must be sufficient and kept in a suitable condition to enable the public to pass over it. *Beckwith v. Whalen*, 70 N. Y. 430 (1877). In performing the duty of repairing highways the town superintendent has discretionary power, and if he does not exceed his statutory authority, it will be assumed, unless the contrary appears, that he acted in good faith and according to the best of his judgment. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894). He is also permitted to use his own judgment in determining whether any repairs are necessary; there is no absolute and imperative duty imposed upon him to repair in a given case. *Peck v. Batavia*, 32 Barb. 641 (1860).

Where town superintendents have not sufficient funds in their hands to provide the needed repairs it is within their discretion to apply the fund on hand in making such repairs as are most urgently needed. They are not nor is the town liable for an error in judgment in so doing, if they act reasonably and in good faith. *Monk v. Town of New Utrecht*, 104 N. Y. 552 (1887); *Patchen v. Town of Walton*, 17 App. Div. 158, 45 N. Y. Supp. 145 (1897).

**Use of material taken from highway.** In making necessary repairs to highways the town superintendent may take soil from any portion of the highway including the unused roadside, regardless of any grading or other improvements made by abutting owners, in the absence of proof that the town superintendent has not acted wantonly or maliciously. *Anderson v. Van Tassel*, 53 N. Y. 631 (1873). Where it is necessary to cut down the bed of the highway, the fee of which is not in the public, in order to bring it to a desired grade, the town superintendent may use the earth and stone thus taken out to repair any part of a highway upon which they may see fit to put them; but unless it is necessary to remove the earth and stone for that purpose, they may not use them for the purpose of repairing any part of the highway, except that part which is opposite the lands of the owner who owns the fee of the highway at the point where the materials were removed. *Robert v. Sadler*, 104 N. Y. 229 (1887); *Ladd v. French*, 6 N. Y. Supp. 56, 24 N. Y. St. Rep. (1889).



Stones and other material taken from the highway and not required for the use of the highway belong to the abutting owner if his title covers the highway. *Deverell v. Bauer*, 41 App. Div. 53, 58, N. Y. Supp. 413 (1899).

The town superintendent may purchase gravel and stone for the purpose of repairing town highways, section 51, *post*.

**3. Divide the town into as many sections as may be necessary for the proper maintenance and repair of the highways therein, and the opening of highways obstructed by snow.**

**Derivation.** It was provided in section 4, subdivision 3, of the former Highway Law, that "in a town which has adopted the money system of taxation for highway purposes the highway commissioner may divide such town into highway districts, whenever in his judgment such division is necessary for the proper maintenance and repair of the highways therein, and for the opening of highways obstructed by snow."

**Object of division.** The old highway district being abolished by this law in all towns, it may be advisable for the town superintendent in some instances to divide his town into sections and employ some one to see that the highways therein are properly maintained and repaired. The next subdivision authorizes the town superintendent to provide for the organization and supervision of persons employed by him upon a highway. When he divides his town into sections he may place in charge of the highways therein some person whom he may make responsible for the condition thereof in much the same manner as the overseers of highways were responsible under the former labor system.

In view of the agreements which are to be entered into under section 105, *post*, for the expenditure of highway moneys "for the repair and improvement of such highways, sluices, culverts and bridges, at such places and in such manner as may be agreed upon by the town board and town superintendent" it will be appropriate for the town superintendent to divide his town into sections and submit the division to the town board for their consideration, so that future agreements may be made in respect to the sections so constituted.

**Division of town under former law.** As to duty to divide town into districts, see *Lane v. Town of Hancock*, 142 N. Y. 510 (1894).

The highway commissioner is empowered to discontinue a district and divide it among other districts from which it was originally taken. *People ex rel. Seward v. Sly*, 4 Hill, 593 (1843).

The commissioner must exercise this power; but in so doing he acts upon his own judgment and discretion. *Buffalo Plank Road Co. v. Commissioners, etc.*, 10 How. Pr. 237 (1854).

The object of dividing a town into highway districts is to divide the work to be done in repairing the highways to the end that the highways in each district may speedily receive the benefits of the money available for repair and maintenance. *Chamberlain v. Taylor*, 36 Hun, 24, 37 (1885).

**4. Employ such persons with teams and implements, as may be necessary for the proper maintenance and repair of highways**

and bridges, and the removal of obstructions caused by snow, subject to the approval of the town board, as hereinafter provided, and provide for the organization and supervision of the persons so employed. He shall file a list of the names of the persons so employed, with the compensation paid to each, and the capacity in which they were employed in the office of the town clerk.

**Derivation.** The highway commissioners, under the former law, in towns which adopted the money system, were authorized to employ labor in the repair and maintenance of highways and bridges. The State Engineer, under authority of former Highway Law, § 55e, directed the organization of the forces employed by the highway commission. This direction is now included in the statute.

**Payment of laborers.** When an agreement has been entered into between the town board and the town superintendent, as provided in section 105, *post*, authorizing the expenditure of highway moneys at such places and in such manner as may be specified in such agreement, the town superintendent is authorized to employ such labor as may be necessary in making such repairs and improvement, and the wages are to be paid by the supervisor on the written order of the town superintendent.

Weekly or semi-monthly pay days should be established and provision made by the town superintendent and supervisor for the issue and payment of town orders upon such day. Under the former Highway Law the State Engineer issued directions providing for the payment of laborers on certain days. See Road Red Book, 1906, page 13.

**Superintendent not to employ own team.** The Attorney-General under the former law held that highway commissioners should not employ their own teams to work on highways under their control, and in doing so called attention to section 473 of Penal Code, which makes it a misdemeanor for a public officer to become interested individually in any sale, lease or contract made by him. In addition to this expressed prohibition, it is against the established principles of public policy to allow a public officer to be both the employer and the employed. Report of Attorney-General (1903), 309.

**List of employees.** The statute does not specifically state when the lists of persons employed by the town superintendent are to be filed with the town clerk. It is probable that the commission will supply this omission by a rule or regulation. The filing of the list is required so as to enable an interested taxpayer to determine the persons to whom and the manner in which the highway moneys are expended. The list may be in the following form:

**FORM No. 10.**

**List of Persons Employed.**

I, John Dingman, \_\_\_\_\_, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, do hereby certify that the following persons, with teams and implements [if any] have been employed by me in

the maintenance and repair of highways and bridges in such town during the months of \_\_\_\_\_, 19\_\_\_\_, that they were employed for the number of hours and were paid the compensation herein specified.

Name.	Teams and implements.	Hours.	Compensation.
Adams, John.....	Team and wagon.....	64	\$25 60
Brown, Sam.....	.....	90	13 50
Smith, Levi.....	Team. . . . .	60	24 00
Dated _____,	day of _____,	19____.	

John Dingman,  
Town Superintendent of Highways.

**5. Construct and keep in repair sluices and culverts and cause the waterways, bridges and culverts to be kept open.**

**Derivation.** This subdivision is new in terms, although it was always the duty of highway commissioners to keep in repair sluices and culverts as a part of the highway. In money system towns the State Engineer, under powers conferred by the former Highway Law, directed that "All sluices or culverts having a span or opening of two feet or less shall be repaired and constructed and the expense thereof paid from the highway fund." Road Red Book, 1906, page 12.

**Ditches, culverts and waterways in State and county highways** are required to be kept open and free from obstructions at all times, by the town superintendent. See section 53, *post*. It is made unlawful for the owner or occupant of lands adjoining a highway to fill up any ditch or place any material of any kind or character therein so as to in any manner obstruct or interfere with the purposes for which it was made. See section 71, *post*.

**6. Cause loose stones lying in the beaten track of every highway within his town to be removed at least three times each year between the first day of April and the first day of December. Stones so removed shall be conveyed to some place from which they shall not work back, or be brought back into the track by road machines or other implements used in repairing such highways.**

**Derivation.** Under section 20, subdivision 5, of the former Highway Law, it was made the duty of the overseer of highways in labor system towns to cause loose stone in the beaten tracks of every highway to be removed once in every month.

**Injurious substances in highways.** A person who willfully throws, drops or places, or causes to be thrown, dropped or placed, upon any road, highway, street or public place, any glass, nails, pieces of metal or other substances which might wound, disable or injure any animal is guilty of a misdemeanor. Penal Code, section 661.

Penal Code, section 654a, is as follows: "Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, or shall cause or procure to be thrown, dropped or placed, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or place, any glass,

tacks, nails, pieces of metal, briar, thorn or other substance which might injure or puncture any tire used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor and on conviction be fined not less than five nor more than fifty dollars."

Depositing ashes, etc., upon highway. It is provided in section 288, *post*, that any person who shall deposit or throw loose stones, ashes, etc., in the highway is liable to a penalty of ten dollars.

7. Cause noxious weeds growing within the bounds of the highway to be cut and removed, at least twice each year, once between the first and fifteenth day of July, and once between the first and fifteenth day of September. He shall also cause all briars and brush within the bounds of the highway to be cut and removed once between the first and fifteenth day of September in each year, as provided by section fifty-four of this chapter, unless otherwise directed by the commission.

*Derivation.* By section 53a of the former Highway Law, as amended by L. 1904, chap. 478, it was made the duty of the commissioner of highways to cut and remove weeds and brush in the highway in case the owner of the abutting land failed to do so after service of notice. By section 70 of the former law it was made the duty of the owners of land adjoining highways to cut the weeds, briars and brush within the bounds of the highway between the fifteenth day of June and the first of July and between the fifteenth day of August and the first of September. By section 71 of the former law the overseers or commissioners were required to notify the owners of such lands to cut such weeds, briars and brush, and if they were not cut within ten days after receiving the notice, the overseer or commissioners were required to do the work and the expense thereof was charged against the land. Section 53a of the former law applied to towns where the money system had been adopted and sections 70 and 71 related to towns retaining the labor system.

*Removal of weeds and brush by land owners.* It is made the duty of the owner or occupant of lands situated along the highway to cut and remove the weeds and brush within the bounds of the highway and, in case of failure, the town superintendent is required to do the same and charge the expense thereof upon such owners or occupants. See section 54, *post*.

A town superintendent has no authority to create a liability upon the part of his town to a person hired to cut brush along a town highway, and even if such liability were created, it would not become actionable until the claim had been acted upon by the town auditors. *Wright v. Town of Wilmurt*, 44 Misc. 456, 90 N. Y. Supp. 90 (1904).

8. Cause such highways as shall have been laid out, but not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered on record in the town clerk's office.

**Derivation.** This subdivision is the same as subdivision 2 of section 4 of the former Highway Law.

**Highways by use.** It is provided in section 209, *post*, that all lands which shall have been used by the public as a highway for the period of twenty years or more, shall be a highway.

**Surveys.** When a town superintendent lays out a highway it becomes the duty of the district or county superintendent to cause a survey thereof to be made, which survey is to be incorporated by the town superintendent in an order signed by him and recorded in the office of the town clerk. See section 190, *post*. If a survey is required under this subdivision the proper procedure would be to notify the district or county superintendent who should proceed to make the same as in the case of the laying out of a highway by the town superintendent.

The board of supervisors is authorized to direct the town superintendent of highways of a town to cause a survey to be made, at the expense of the town, of a highway therein, or to revise and correct existing records of highways by new surveys. County Law, section 72, *post*.

**When survey authorized.** The law constantly presumes that public officers have performed their official duty, and, where no such record has been made in relation to a road, the presumption is that the facts required to be recorded never existed. *Harriman v. Howe*, 60 N. Y. St. Rep. 225, 28 N. Y. Supp. 858 (1894); *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892). Where a highway has been dedicated to the public for the prescribed period of twenty years the town superintendent may cause a survey to be made thereof and remove fences and other encroachments within the limits of such highway. *James v. Sammis*, 132 N. Y. 239 (1892).

**Form of survey.** A writing signed by the commissioners, although not containing a formal order laying out the highway, which purports to be a survey of the road, describes the center line, and states where the road is to commence and terminate and which was filed with the town clerk, is a substantial compliance with the statute; no particular form is necessary and the acts of such officers should receive liberal construction. *Tucker v. Rankin*, 15 Barb. 471 (1853).

**Effect of survey.** The order cannot have the effect to increase or change the width or location of the highway from what it was before; it could be effectual only as a description of the width as manifested by the permitted use for twenty years. *Ivory v. Town of Deerpark*, 116 N. Y. 476 (1889); *People v. Judges of Cortland Co.*, 24 Wend. 491 (1840); *Cole v. Van Keuren*, 4 Hun, 262, 6 T. & C. 483, affirmed, 64 N. Y. 646 (1875). An order of the superintendent is not conclusive upon a person claiming that the highway is a private road; the statute does not authorize the superintendent to create or enlarge, but only to perpetuate, the evidence of a public right. *Cole v. Van Keuren*, 4 Hun, 262, 6 T. & C. 483, affirmed, 64 N. Y. 646 (1875).

A certificate or order of the town superintendent merely ascertaining and describing a road as a highway is insufficient as a defense in an action against him for trespass, where it does not purport to be based upon a record nor upon an adjudication that there had been a user of twenty years without record. *Kelsey v. Burgess*, 35 N. Y. St. Rep. 368, 12 N. Y. Supp. 169 (1890).

**Private roads.** Roads dedicated to public use by private persons, but not adopted by the local public authorities, or declared highways by statute, are

not highways within the meaning of the highway acts. *Oswego v. Oswego Canal Co.*, 6 N. Y. 257 (1852).

User alone is insufficient to constitute a public highway. It must be associated with some act showing such use to be claimed as a right hostile to and independent of the will of the owner, such as reparation, or assuming the control of the road in some ostensible manner. The presumption of a grant of the right of way springs from the lapse of twenty years in connection with the adverse use by the public. *Harriman v. Howe*, 78 Hun, 280, 28 N. Y., 28 N. Y. Supp. 858 (1894).

The failure of the town to cause a public highway, long in use, to be opened to its full width, for thirty years, does not extinguish the rights of the public in the parts not opened. *Walker v. Caywood*, 31 N. Y. 51 (1865).

When the people have the right to travel the road and have done so for the prescribed time, it is a public highway notwithstanding the neglect of the superintendent to accept it by having it recorded. *Devenpeek v. Lambert*, 44 Barb. 596 (1865).

The statute makes the road a highway, if it has been in use for twenty years, independent of any judgment of the superintendent. *Snyder v. Plass*, 28 N. Y. 465 (1864). For history of statutes relative to statutory highways by user, see *James v. Sammis*, 132 N. Y. 239 (1892). See cases cited under section 209, *post*.

9. Inspect all highways which are to be constructed or improved as state or county highways, when directed by the district or county superintendent, for the purpose of securing preliminary information to be used in preparing the plans and specifications for such highways, and mark or in some substantial manner designate the portions of such highways which may need special care and attention. He shall report to the district or county superintendent the condition of such highways and submit therewith such recommendations in respect thereto as may seem expedient. The district or county superintendent may require additional reports in respect to such highways whenever it seems to him to be necessary.

*Derivation.* This subdivision is new.

*Preliminary inspection of State or county highways.* The town superintendent must hold himself in readiness, under this subdivision, to comply with the directions of the district or county superintendent as to the inspection of highways which are to become a part the county or State system. The object of the inspection is to inform the commission, and others having duties to perform in respect to such highways, as to local conditions. The town superintendent should freely give such information as will be of use in determining the character of the highway to be built. If there are certain conditions not readily apparent upon an ordinary examination, but which should be known to one acquainted with the road throughout all the seasons, it is the duty of the town superintendent to inform the district or county superintendent or the representative of the commission of such condition.

This investigation should be made preliminary to the preparation of the maps, plans, specifications and estimates for State or county highways, required by section 125, *post*.

10. Attend public meetings called by the commission, held within the county, after receiving notice thereof from the district or county superintendent, and his expenses necessarily incurred thereby shall be a town charge.

**Derivation.** This subdivision is new.

**Public meetings.** It is made the duty of the commission to cause public meetings to be held at least once each year in each county or district for the purpose of giving information and instruction to highway officers and other interested in highway construction and improvement. By section 33, subdivision 7 it is made the duty of the district or county superintendent to mail to each town superintendent and supervisor a notice of the meeting so called by the commission.

11. Cause the monuments erected, or to be erected, as the boundaries of highways, to be kept up and renewed so that the extent of such highway boundaries may be publicly known, and erect and establish such new monuments as may be required by the district or county superintendent.

**Derivation.** It was provided by section 20, subdivision 6, of the former Highway Law, that each overseer of highways in every town should "cause monuments to be erected as the boundaries of highways, to be kept up and renewed so that the extent of such highway boundaries may be publicly known." The present law also requires the erection and establishment of new monuments when required by the district or county superintendent.

**Suitable monuments.** The board of supervisors is authorized to direct the town superintendent to establish the location of highways by suitable monuments at the expense of the town. County Law, section 72, *post*.

12. Collect all penalties prescribed by this chapter.

**Derivation.** Under section 23 of the former Highway Law the commissioner of highways was required to prosecute each overseer of highways "for any penalties known to the commissioners to have been incurred by the overseer." Under section 164 of the former Highway Law it was provided that the commissioner of highways should recover all penalties in the name of the town and, when recovered, the same were to be applied for the improvement of highways and bridges therein.

**Disposition of penalties.** All penalties collected by the town superintendent are required to be paid to the supervisor, section 104, *post*, and the supervisor is required to report in respect thereto, section 107 *post*.

**Penalties recovered** by commissioners of highways belong to the town and must be accounted for by such commissioners. *Albro v. Rood*, 24 Hun, 72 (1881). See *People ex rel. Loomis v. Town Auditors*, 75 N. Y. 316 (1878).

Penalties prescribed in this chapter. For failure of owners of unsafe toll bridge to repair the same, section 72, *post*, damages in actions for injuries to highways shall be brought by the town superintendent, section 73, *post*.

Penalty for driving or riding faster than a walk on a bridge, sections 252 and 253, *post*. Failure of person operating ferry to post schedule, section 274, *post*. Forfeiture for the employment of intemperate drivers, section 282, *post*. Forfeiture for failure of owner of carriage for conveyance of passenger to discharge driver upon receiving notice of his having been intoxicated, section 283, *post*. Forfeiture for leaving horses without being tied, section 284, *post*. Penalty for the deposit of stones, ashes and refuse in highways, section 288, *post*. Penalty for neglecting to comply with law of the road, section 292, *post*. Penalty for falling trees in the highway, section 295, *post*. Forfeiture for failure to remove fallen trees from the highway, section 296, *post*.

Neglect or refusal of town superintendent to prosecute for a penalty subjects the town superintendent to a penalty, see section 67, *post*. Refusal or neglect to comply with request for erection of guide boards subjects town superintendent to forfeiture of \$25, see section 68, *post*.

Actions for penalties. Any action for the benefit of a town to recover penalty or forfeiture given to a town officer, or the town represented by him, must be brought in the name of the town. Town Law, section 182. As to actions generally by or against town superintendents of highways, see Code Civil Procedure, sections 1925-1928. Prior to the enactment of section 182 of the Town Law it was held that actions brought by a highway commissioner for the recovery of penalties might be brought by him in his own name with the addition of his official title. *Gould v. Glass*, 19 Barb. 179 (1855); *Commissioners of Cortlandville v. Peck*, 5 Hill, 215 (1843).

13. Report annually on such date as may be prescribed by the commission, prior to November fifteenth, to the district or county superintendent, in relation to the highways and bridges in his town, containing the matter and in the form to be prescribed by the commission.

Derivation. This subdivision is new.

Reports are to be made by town superintendents to district or county superintendents and by the latter to the State commission. See section 33, subdivision 6, *ante*, p. 24. The commission is required to prescribe the form and furnish blanks for the reports of town superintendents, see section 18, *ante*, p. 19.

14. Perform such other duties and have such other powers as may be imposed or conferred by law, or the rules and regulations of the commission, including the powers and duties heretofore exercised or performed by highway commissioners.

Derivation. This subdivision is new.

Powers other than those specified in the present Highway Law. The town superintendents have the following powers and duties in addition to those specified in the present Highway Law:



Town superintendents act with town assessors as fence viewers. See Town Law, section 21. Their powers and duties as fence viewers are prescribed by Town Law, sections 100-108.

Town superintendents are required to cause surveys to be made of existing highways when directed so to do by boards of supervisors, County Law, section 72, *post*.

Duties in respect to railroad crossings, intersecting or upon highways, see Railroad Law, section 11, *post*.

Duties in respect to franchises of railroads operating in highways, see Railroad Law, sections 91 and 92, *post*.

As to consent of town superintendent for construction of pipe lines across, along or upon public highways, see Transportation Corporations' Law, section 45, *post*. As to rights of water-works corporations in highways and permits of local authorities, see *Idem.*, section 80, *post*. As to agreement for use of highways by turnpike and plank road corporations, see *Idem.*, section 122, *post*. Duties of town superintendent of highways as inspectors of plank roads and turnpikes, see *Idem.*, section 134, *post*; upon change of route of turnpike or plank road, see *Idem.*, section 135, *post*; upon encroachment of fences upon turnpike or plank road, see *Idem.*, section 142.

**Fires in woods.** Whenever the woods in any town shall be on fire, it shall be the duty of the justices of the peace, the supervisor and commissioners of highways of such town, and of each of them, to order such and so many of the inhabitants of such town liable to work on the highways and residing in the vicinity of the fire, as they shall severally deem necessary, to repair to the place where such fire shall prevail, and there to assist in extinguishing the same, or in stopping its progress. Town Law, section 82.

§ 48. **Contracts for the construction of town highways.**—The town board of any town may provide that the construction of new highways, or the permanent improvement or reconstruction of existing highways, the cost of which will exceed five hundred dollars, shall be done under contracts. All such contracts shall be awarded by the town superintendent, in accordance with estimates, plans and specifications to be furnished by the district or county superintendent, or by the commission, as provided in this chapter, to the lowest responsible bidders, after advertisement once a week, for three consecutive weeks, in a newspaper published in the town where the work is to be performed, or if no newspaper is published therein, in a newspaper published at some other place in the county, having the largest circulation in said town. All bids for such work shall be opened in public and shall be filed in the office of the town clerk. No such contract shall be awarded, unless it be approved by the district or county superintendent, as to its form and sufficiency. The person to whom such contract is awarded shall execute a bond to the town, in a sum equal to the amount of the contract, with two or more sureties to be approved by the town board, conditioned for the faithful

compliance with the terms of the contract, and the plans and specifications and for a payment of all damages which may accrue to the town, because of a violation thereof. When such work is completed pursuant to the terms of such contract, and the plans and specifications therefor, and accepted by the district or county superintendent and town board, as being in accordance therewith, the cost of the work under the contract shall be paid out of moneys available therefor, in the same manner as other highway expenses. Payments made under such contract shall be upon certificates issued to the contractor by the district or county superintendent, to the effect that the work has been done under and in accordance with the terms of such contract, and the plans and specifications. All work done under any such contract shall be under the supervision of the district or county superintendent, or some person designated by him. The town superintendent shall file all contracts, awarded under this section or as provided in this chapter, for the construction, improvement or repair of town highways and bridges, with the town clerk of the town within ten days after their execution.

**Derivation.** This section is derived from section 183 of the former Highway Law. Such section only applied to contracts for the construction of highways in counties which had adopted the provisions of article 8 of the former Highway Law, relating to county supervision of highways. The last sentence is derived from L. 1895, chap. 717, sections 2 and 3.

**Approval of plans, specifications and estimates** by district or county superintendent is also required by section 33, subdivision 5, *ante*, p. 24. When requested by town superintendent, the commission may cause plans, specifications and estimate to be prepared for the repair or improvement of a town highway, see section 15, subdivision 5, *ante*, p. 15.

**Payment** for the repair and improvement of town highways under contract are to be made in conformity with an agreement entered into pursuant to section 105, *post*, p. 156.

**Contracts** made by a town superintendent under this section for and in behalf of the town must be in the name of the town. When such contracts are otherwise lawfully made, they shall be deemed the contracts of the town, notwithstanding it is omitted to be stated therein that they are in the name of the town. Town Law, § 182.

This section of the Town Law has not changed the old rule that a commissioner [now town superintendent] of highways cannot create any liability upon the part of his town to pay for materials ordered by him for the ordinary repair of town highways. Highway commissioners are charged with the duty of keeping town highways in repair as independent officers and not as agents of the town, and when they contract for such ordinary repairs no liability is created against the town, and the commissioners themselves as such officers, and not the town, should be sued for the debt. *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900).

§ 49. **Machinery, tools and implements.**— The town superintendent may, with the approval of the town board, purchase for the use of the town, stone crushers, steam rollers, traction engines, road machines for grading and scraping, tools and other implements, subject to the limitations prescribed in section ninety-four, which shall be paid for from moneys levied and collected or from the proceeds of bonds issued and sold for such purposes as provided in this chapter. No contract for the purchase of stone crushers, steam rollers or traction engines shall be valid, unless the district or county superintendent shall have approved thereof and endorsed his approval upon such contract. All road machines, stone crushers, steam rollers, tools and other implements owned either by the town or the highway districts therein, when this chapter takes effect, shall be used by the town superintendent in such manner and at such places in such town as he shall deem best. They shall be under the control of the superintendent and be cared for by him at the expense of the town. The town superintendent shall annually make a written inventory of all such machinery, tools and implements, indicating each article and stating the value thereof, and the estimated cost of all necessary repairs thereto, and deliver the same to the supervisor of the town on or before October thirty-first in each year. He shall at the same time file with the town clerk his written recommendations as to what machinery, tools and implements should be purchased for the use of the town, and the probable cost thereof. The town superintendent shall provide a suitable place for housing and storing all machinery, tools and implements owned by the town and cause the same to be stored therein, when not in use. Where there is an incorporated village constituting a separate road district, wholly or partly in a town which has purchased a stone crusher, steam roller or traction engine, the town board of such town may permit the use thereof by such village upon such terms as may be agreed upon.

**Derivation.** This section is a substitute for section 6 of the former Highway Law providing for the purchase of road machines by towns and highway districts. The greater part of the former section 6 pertained to the purchase of road machines and implements by highway districts in towns which were under the labor system of taxation. So much of such section as relates to the purchase of such machines by the entire town has been retained. Section 7 of the former law authorizes the purchase of stone crushers, steam rollers, and such other machinery as may be necessary to be used, when authorized by a majority vote of the electors at a biennial or special town meeting. The present law authorizes the town superintendent, with the approval of the

town board, to purchase all kinds of machinery, tools and implements, subject only to the limitation prescribed in section 94 which is to the effect that not more than \$500 shall be levied and collected in any one year in any town for the purchase or repair of such machinery, tools and implements, unless duly authorized by a vote of a town meeting.

Road machinery and tools and implements owned by the town or highway district therein are to be used, under this section, by the town superintendent at any place in the town and are to be cared for by him at town expense.

Road machines purchased by former highway districts. Under the former law in towns where the money system was adopted and highway districts thereby abolished it was held by the Attorney-General that the general care and control of road machines purchased by such separate highway districts, as provided in section 6 of the former Highway Law, vested in the highway commissioner, but that the use of such machines should be confined to the highways in the particular district or locality to which they belonged at the time of the change of the system. Report of Attorney-General (1903), 284. The force of this opinion is weakened by the present law, because it is now provided that such machines may be used by the town superintendent "in such manner and at such places in such town as he shall deem best."

Contracts for the purchase of stone crushers, steam or power rollers or traction engines must be submitted to the district or county superintendent for his approval. The last sentence of the preceding section (§ 48) requires the town superintendent to file all contracts awarded as provided in this chapter with the town clerk of the town within ten days after their execution.

All such contracts should be in the name of the town, and when lawfully made they are to be deemed contracts of the town notwithstanding it is omitted to be stated therein that they are in the name of the town. Town Law, § 182.

Moneys available for the purchase of road machinery, tools and implements must be estimated for separately by the town superintendent, under section 90, subdivision 3, *post*, and when collected must be paid to the supervisor to be paid out by him upon the order of the town superintendent according to such estimate. If the amount estimated for is insufficient an additional amount may be raised by a vote at a town meeting, as provided in section 92, *post*. No part of the money received from the State is available for the purchase of road machines. See section 101, *post*. The money available for such purposes can only be paid out by the supervisor upon the written order of the superintendent after audit by the town board. See section 106, *post*.

The inventory of machinery, tools and implements required by this section must be delivered to the supervisor and included in his report to the town board. See section 107, *post*.

Under the former law it was held that a town is not liable for the price of a road machine purchased by its commissioner of highways, with the assent of the town board, since it was expressly required, under section 6 of the former law, that the machine be paid for with money appropriated for highway purposes, thus excluding any power on his part to impose a debt upon the town. *Acme Road Machine Co. v. Town of Bridgewater*, 185 N. Y. 1 (1906). This case is overruled by the present law since it is now provided that the town superintendent may purchase machines with the consent of

the town board. It is, however, authority for the rule that the statute relating to the purchase of such machines must be strictly observed or the town will not be liable.

**Control of machines; liability.** As a road scraper belongs to the town and is employed in working the highways, it is under the control of the town superintendent; and the town is liable for injuries sustained by reason of his negligently leaving it in the road at night. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891).

**§ 50. Town superintendent may hire machinery.**— The town superintendent may, with the approval of the district or county superintendent, lease or hire stone crushers, steam rollers and traction engines at a rate to be approved by the town board, which shall not exceed ten dollars for a stone crusher and steam roller, and eight dollars for a traction engine, for each day such stone crusher; steam roller or traction engine is actually used upon the highways. The expense thereof shall be paid by the supervisor, upon the written order of the town superintendent, out of moneys received by him, as provided in this chapter, for the repair and improvement of highways.

**Derivation.** This section is new.

Under the former law there was no authority for the rental of stone crushers, rollers and traction engines, although towns frequently did rent such machinery under an assumption of implied power.

**Payment of rental** is to be made by the supervisor upon the order of the town superintendent after audit, as provided in section 106, *post*. It is expressly provided in this section that such expense shall be paid out of moneys received for the repair and improvement of highways, so that money received by the State in aid of highway improvement may be expended for the rental of stone crushers, steam rollers and traction engines.

**§ 51. Purchase of gravel and stone.**— The town superintendent may, with the approval of the town board, purchase of the owner of any gravel bed or pit, or stone quarry within the town, gravel or stone for the purpose of grading, repairing or otherwise improving the highways of the town, at a price per cubic yard to be approved by the town board. If such town superintendent cannot agree with any such owner for the purchase of such gravel or stone, he may, with the approval of the town board, acquire by condemnation the right to take and use such gravel or stone, and to remove the same from such bed, pit or quarry, for the purpose of grading, repairing or otherwise improving such highways, together with the right of way to and from such bed, pit or quarry, for the purpose of such removal. No such gravel or

stone shall be so taken by condemnation within five hundred feet of any house or barn, or from any lawn, orchard or vineyard. The purchase price of such stone or gravel and the damages awarded in such condemnation proceedings, together with the costs and expenses thereof, shall be a town charge and paid from moneys levied and collected therefor, as provided by law. If the town shall abandon for the period of three years any right acquired under this section to take and use the gravel or stone from any such bed, pit or quarry, for a period of three years, or if the superintendent shall cease to use the same for the purposes for which it was acquired, the right thereto shall cease, and the ownership thereof shall revert to and become vested in the owner of such bed, pit or quarry, or his heirs or assigns.

**Derivation.** This section is derived from L. 1891, chap. 309, §§ 1 and 2, modified by eliminating references to highway districts and providing for the equalization of the right to use and take stone from a stone quarry. The former law did not permit the taking of gravel within one thousand feet of any house or barn, or from any lawn, orchard or vineyard. The present law changes the distance to five hundred feet.

§ 52. **Obstructions and their removal.**—Obstructions, within the meaning of this section, shall include trees which have been cut or have fallen either on adjacent lands or within the bounds of the highway, in such a manner as to interfere with public travel therein; limbs of trees which have fallen within the highway, or branches of trees overhanging the highway so as to interfere with public travel therein; lumber, wood or logs piled within the bounds of the public highway; machines, vehicles and implements abandoned or habitually placed within the bounds of the highway; fences, buildings or other structures erected within the bounds of the highway; earth, stone or other material placed in any ditch or waterway along the highway; telegraph, telephone, trolley and other poles, and the wires connected therewith, erected within the bounds of the highway in such a manner as to interfere with the use of the highway for public travel.

It shall be the duty of each owner or occupant of lands situate along the highway, to remove all obstructions within the bounds of the highway, which have been placed there, either by themselves or by their consent. It shall be the duty of all telephone, telegraph, electric railway and other electrical companies, to remove and reset telephone, telegraph, trolley and other poles and the wires con-

nected therewith, when the same constitute obstructions to the use of the highway by the traveling public. If such obstructions are not removed, or such poles or wires are not moved and reset, within thirty days after the service of a notice, personally or by mail, upon such owner or occupant, or upon such company at its principal place of business, or an agent of such company within the town, requesting the same to be done, the town superintendent shall remove such obstructions, and move and reset such poles and wires. The expense thereby incurred shall be paid in the first instance out of moneys levied and collected and available therefor, and the amount thereof shall be charged against such owner, occupant or company, and levied and collected, as provided in section fifty-five.

**Derivation.** This section is new. It is intended as a substitute for former Highway Law, §§ 104 and 105, wherein it was provided that obstructions shall be removed by the owner or occupant of lands adjoining highways, and in case of a failure a penalty was prescribed, or the commissioner might remove and recover the expense from the owner or occupant. It will be noticed that the present section expressly specifies what constitute obstructions.

**Fallen trees.** It is the duty of the owners or occupants of lands from which a tree shall fall into the highway to remove the same. See section 296, *post*.

**Penal liability.** By the Penal Code an obstruction is made a public nuisance and the person maintaining it is guilty of a misdemeanor punishable by a fine of not more than \$500, or by not more than one year's imprisonment or by both. Penal Code, §§ 385, 387.

**Assessment of cost of removing obstructions and moving and resetting poles against owners and occupants** must be made by the town superintendent in the manner prescribed by section 55, *post*,

**Telegraph and telephone poles in highways.** There was no provision in the former Highway Law for the removal of telegraph and telephone poles in a highway, other than a highway constructed or improved under the Higbie-Armstrong Act (L. 1898, chap. 115). But frequent questions arose relative to the right of highway commissioners to remove such poles when they constituted obstructions. In response to such a question the Attorney-General, in an opinion under date of September 8, 1904, made the following statement:

"I assume the telephone poles have been placed in the highway in pursuance of the provisions of section 102 of the Transportation Corporations Law, which reads as follows:

"Construction of Lines.—Such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this State, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation cannot agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the Condemnation Law."

“Therefore, they may be lawfully in the highway notwithstanding no permission has been given by the highway authorities. Nevertheless, it has been held in *Hudson River Telephone Company v. Watervliet Turnpike and Railway Company*, 135 N. Y. 393 (1892), that ‘the primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be insubordination of this use, unless a contrary intent is clearly expressed.’

“There does not seem to be any expression of intention in the section above quoted to permit the placing of telephone poles in a highway so as to obstruct public travel or to permit their continuance therein if such continuance results in an obstruction. On the contrary, I think the rule laid down in the case just cited applies, and that it appears that such poles are so situated in the highway as to interfere with the free use thereof by the public for passage, their removal can be compelled to a place in the highway where they will not obstruct the use of the highway for public travel.

“I do not mean to be understood as holding that the telephone company has no right to maintain the necessary fixtures to carry its lines along a public highway, but the rule established by the authorities quoted is that the highway must be kept free for public travel, and if structures like telephone lines or telegraph lines are placed therein they must be so constructed as not to prevent the free and uninterrupted use of the highway for travel by the public.

“It follows, therefore, that if the telephone poles mentioned stand in such portions of the highway as are needed for highway purposes and so as to obstruct public travel, the highway commissioners may and should, by written notice served upon the owners thereof, direct their removal, and in the event of the failure of their owners to remove them the highway commissioners may of their own motion summarily remove them.” It is to be noted, however, that the opinion of the Attorney-General was given prior to the enactment of section 20 of the Higbie-Armstrong Act (L. 1898, chap. 115), as amended by L. 1907, chap. 717.

Subject to reasonable regulations by the town superintendent, telephone poles may be erected in the highway, and they are not a nuisance *per se*. *Scofield v. Town of Poughkeepsie*, 122 App. Div. 868, 107 N. Y. Supp. 208 (1907).

**Obstructions and encroachments in highways.** *a. Effect of present law.* This section enumerates certain things which are deemed to be obstructions. All of these things would have been obstructions under the former law, which contained no such specific enumeration, if they obstructed the highway or interfered with its use for public travel. The present law is not exclusive of other obstructions not therein specified. The cases decided under the former law will, in most instances, be found applicable under the present.

*b. General rule as to obstructions.* The general rule is that the public are entitled to the street or highway in the condition in which they placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above or below the surface, is guilty of maintaining a nuisance, for which he is liable in damages to a person directly injured, and to indictment on behalf of the people. *People v.*



Horton, 64 N. Y. 610 (1876). This is the common-law rule respecting obstructions in highways. The statute makes it the duty of the persons responsible for such obstructions to remove them, and provides for their removal by the town superintendent at the expense of such persons, in case of their failure or neglect to perform such duty.

*c. What constitute obstructions.* Anything which unreasonably obstructs a highway so as to prevent the use thereof for the purposes for which it is maintained is an illegal obstruction and must be removed as provided in this section, or may be abated as a nuisance. For instance, it is a nuisance to erect a gate or fence across a highway, or to construct a building thereon, or to cut a ditch or mill-race across it without bridging the same, and in general to unnecessarily or permanently occupy the highway in any manner other than for highway purposes. *Kelly v. Commonwealth*, 11 Serg. & Rawl. (Pa.) 345; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Dygart v. Schenck*, 23 Wend. 445. Slight inconveniences and occasional interruptions of the use of a highway, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have full use thereof. *People v. Horton*, 64 N. Y. 610 (1876).

The failure of the superintendent to cause a public highway, in use for over thirty years, to be opened to its full width, does not extinguish the rights of the public in the parts not opened. *Walker v. Caywood*, 31 N. Y. 51 (1865); *Milhan v. Sharp*, 27 N. Y. 611 (1863). So as to nonuser of a portion. *Mangam v. Village of Sing Sing*, 26 App. Div. 464, 50 N. Y. Supp. 647 (1898). But see *Peckham v. Henderson*, 27 Barb. 207 (1858). It is not necessary that the highway obstructed be recorded before a penalty can be recovered. *Town of West Union v. Richey*, 64 App. Div. 156, 71 N. Y. Supp. 871 (1901); *Town of Corning v. Head*, 86 Hun, 12, 33 N. Y. Supp. 360 (1895); *Devenpeck v. Lambert*, 44 Barb. 596 (1865); *Baylis v. Rooe*, 1 Silv. Sup. Ct. 356 (1889); *Fowler v. Mott*, 19 Barb. 204 (1855). But see *Doughty v. Brill*, 36 Barb. 488, affirmed, 3 Keyes, 612, 1 Abb. Ct. of App. Dec. 524 (1862); *Christy v. Newton*, 60 Barb. 332 (1871); *People ex rel. Butler v. Hunting*, 39 Hun, 452 (1886); *Alpaugh v. Bennett*, 59 Hun, 45, 12 N. Y. Supp. 398 (1891). But a public highway cannot be obstructed until it is opened by the superintendent. *Little v. Denn*, 34 N. Y. 452 (1866); *Trustees of Jordan v. Otis*, 37 Barb. 50 (1862); *Doughty v. Brill*, 36 Barb. 488 (1862), affirmed, 3 Keyes, 612 (1867); *Kelly v. Horton*, 2 Cow. 424 (1823). Under chap. 245 of the Laws of 1878 it was held sufficient if the highway is one that has been established by user, even though it has never been laid out or entered of record. *Town of West Union v. Richey*, 64 App. Div. 156, 71 N. Y. Supp. 871 (1901).

An owner of land, over which a highway is laid out, has no right to obstruct the same, although the damages sustained by reason of the opening of the highway have been neither assessed nor paid; it is not a constitutional requisite that the assessment and payment precede the taking, provided the statute has made provision therefor. *Chapman v. Gates*, 54 N. Y. 132, affirming 46 Barb. 313 (1873); *Case v. Thompson*, 6 Wend. 634 (1831).

Every encroachment upon a highway is not a nuisance, as for instance a fence which annoys no one. *Griffith v. McCullum*, 46 Barb. 565 (1866). Trees, lawfully planted in a highway, do not become obstructions or encroachments upon a change in the statute, and the court is powerless to

have them removed; if public convenience required their removal, condemnation proceedings must be instituted and compensation awarded their owner. *Town of Wheatfield v. Shasley*, 23 Misc. 100, 51 N. Y. Supp. 835 (1898); *Edsall v. Howell*, 86 Hun, 424, 33 N. Y. Supp. 892 (1895).

An encroachment or obstruction placed upon a highway, or the taking of possession by an individual, or fencing it up, will not affect or diminish the public rights in it or prevent its being opened and worked. But the public may abandon its claims to a public highway, and nonuser for twenty years is some evidence of such intent. *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381 (1890), affirmed, 130 N. Y. 618; *Burbank v. Fay*, 65 N. Y. 57 (1875). A fence is an obstruction if within highway. *Town of Corning v. Head*, 86 Hun, 12, 33 N. Y. Supp. 360 (1895).

Mandamus will lie to compel the town superintendent to remove both houses which lie in a public highway and cut off access at high-water mark. *People ex rel. Butler v. Hawxhurst*, 123 App. Div. 65, 107 N. Y. Supp. 746 (1907).

*d. Authorized obstructions.* The Legislature, by virtue of its general control over public streets and highways, has the power to authorize structures in the streets and highways, which, under the common law, would be obstructions or encroachments, and may delegate the power to the governing body of a municipality. *Hoey v. Gilroy*, 129 N. Y. 132 (1891). For instance, town, village or city authorities may, if empowered by statute, authorize and regulate the use of awnings, stands for business purposes, and the like, in the public streets. But apart from these exceptions "public highways belong, from side to side, and end to end" to the public. Any permanent or unnecessary obstacle to travel in a street or highway is a nuisance, although space may be left for the passage of the public. Authorities may properly grant a right to a railroad to maintain gates at a highway crossing, and if properly constructed and opened and closed, and necessary to the public safety, cannot be restrained. *Friedlander v. D. & H. C. Co.*, 34 N. Y. St. Rep. 650, 13 N. Y. Supp. 323 (1890).

*e. Obstructions for business purposes.* Reasonable temporary obstruction for purposes of business is permissible. *Welsh v. Wilson*, 101 N. Y. 254 (1886); *St. John v. Mayor*, 6 Duer, 315 (1857). To excuse the placing of an obstruction in a highway it must be shown that it is reasonably necessary for the conduct of one's business, and at the same time does not unreasonably interfere with the right of the public to use the highway. *Tinker v. N. Y., Ontario & Western R. Co.*, 157 N. Y. 312 (1898); *Flynn v. Taylor*, 127 N. Y. 596 (1891); *Callanan v. Gilman*, 107 N. Y. 360 (1887).

In these cases a temporary obstruction or occupation of a part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses were allowed. But one who has occasion to leave a load in a highway must remove it with promptness. If he let it remain there an unreasonable time it may be removed as a nuisance. It is not sufficient, however, that the obstructions are necessary with reference to the business of the person who erects or maintains them: they must be reasonable with respect to the rights of the public. *Callanan v. Gilman*, 107 N. Y. 360 (1887). The definition of obstructions contained in the above section will not be held to greatly modify the principle of these cases. Vehicles and implements habitually placed in the highway are statutory encroachments; but

they can only be removed after thirty days' notice, and if maintained after such a period they will cease to be temporary obstructions, and might be abated as nuisances at common law.

**Notice to remove.** The above section requires notice to be served personally or by mail upon the owner or occupant of the abutting lands, or upon the company erecting poles and wires within the highway, at least thirty days before the town superintendent proceeds to summarily remove them. Under the common law an actual notice must be shown, and it will not be presumed; the burden of proving that it has been given is upon the commissioner. *Case v. Thompson*, 6 Wend. 634 (1831).

A notice or order requiring the removal of such an encroachment must contain a precise and certain description of the particulars of the encroachment to such an extent, at least, as will enable the party upon whom it is served to go upon the ground and fix the place and extent thereof with certainty and without embarrassment. *Town of Sardinia v. Butter*, 149 N. Y. 505 (1896); *Cook v. Covil*, 18 Hun, 288 (1879); *Mott v. Commissioners of Highways of Rush*, 2 Hill, 472 (1842); *Fitch v. Commissioners of Highways of Kirkland*, 22 Wend. 132 (1839); *Spicer v. Slade*, 9 Johns. 359 (1812).

The statute requires the service of a notice to remove an obstruction in the highway. Such notice may be in the following form:

#### FORM No. 11.

##### Notice to Remove Obstruction.

To Frank Jones [or the A. & T. Telephone Co.]

The undersigned, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, hereby notifies you that the highway in such town, adjoining the premises owned [or occupied] by you [or, in case the obstruction consists of telephone, telegraph, or trolley poles and wires, state the location thereof explicitly so that the company notified may readily ascertain where the obstruction is located] is obstructed [or encroached upon in case of a fence] to the extent and in the manner following: [describe encroachment or obstruction plainly so as to enable person or company notified to readily ascertain the place and extent of the encroachment or obstruction], and you are hereby directed to remove such construction [or encroachment] [or, to move and reset such poles and wires] within thirty days after the service of this notice upon you, and in case of your failure to so remove such obstruction [or, to move and reset such poles and wires], I shall cause the same to be removed [or moved and reset] as authorized by section 52 of the Highway Law, and shall assess the cost thereof against you as authorized by section 55 of such law.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

JOHN DINGMAN,

*Town Superintendent of Highways, Town of \_\_\_\_\_.*

**Action for removal.** Former Highway Law, § 105, authorized an action by the commissioner for the removal of an obstruction in the name of the town. The present law contains no such provision, but it is provided that the town superintendent shall proceed summarily to remove the obstruction after notice. Under the former law it was held that such action might be instituted after

a reasonable notice. *Town of Smithtown v. Ely*, 75 App. Div. 309, 78 N. Y. Supp. 178, affirmed, 178 N. Y. 624 (1902). See also under former law as to order of removal, *Olendorf v. Sullivan*, 13 N. Y. Supp. 6, 36 N. Y. St. Rep. 74 (1891); *James v. Sammis*, 132 N. Y. 239, affirming 10 N. Y. Supp. 143 (1892). It was questioned under the former law whether sufficiency of a notice or order of a commissioner to remove an encroachment can be attacked in action of trespass against the commissioner. *Hathaway v. Jenks*, 67 Hun, 289, 22 N. Y. Supp. 421 (1893); *James v. Sammis*, 132 N. Y. 239, affirmed, 10 N. Y. Supp. 143 (1892).

Under the former law a highway commission might either summarily abate the nuisance or bring an action therefor. *Flood v. Van Wormer*, 147 N. Y. 284 (1895). Commissioners of adjoining towns could not unite in the action; it belongs exclusively to the commissioner of the town where the encroachment lies. *Bradley v. Blair*, 17 Barb. 480 (1854).

**Summary removal by superintendent.** It was held under the former law that commissioners of highways had the power to summarily remove from a highway any obstruction placed therein which unnecessarily interferes with the public use of highways, without beginning an action. They could do this without first resorting to any legal proceeding. *Cook v. Harris*, 61 N. Y. 448 (1875); *Hathaway v. Jenks*, 67 Hun, 289, 22 N. Y. Supp. 421 (1893); *Van Wyck v. Lent*, 33 Hun, 301 (1884). But it was also held that the commissioner had no remedy in equity to compel the removal of an obstruction in the highway. *Rozell v. Andrews*, 103 N. Y. 150 (1886).

Where the town superintendent sees fit to remove the encroachment summarily the party would be remediless, except by an action for trespass; such a remedy would be inadequate to afford relief, so injunction will interpose and the plaintiff will not be compelled to wait and seek his remedy after the injury has been actually inflicted. *Flood v. Van Wormer*, 70 Hun, 415, 24 N. Y. Supp. 460, affirmed 147 N. Y. 284 (1893); *Corning v. Lawerre*, 6 Johns. chap. 439 (1822). If, in the discharge of his official duty, the superintendent removes without unnecessary damage an encroachment, after notice, though informal, to the owner, he should not be deemed a trespasser, and no action for trespass will lie against him therefor. *Hathaway v. Jenks*, 67 Hun, 289, 22 N. Y. Supp. 421 (1893).

**Obstruction as public nuisance.** The obstruction of a public highway is an act which in law amounts to a public nuisance, and one who sustains a private and peculiar injury from such an act may maintain an action to abate it and recover the special damages sustained by him. *Wakeman v. Wilbur*, 147 N. Y. 657 (1895); *Adams v. Popham*, 76 N. Y. 410 (1879); *Chipman v. Palmer*, 77 N. Y. 51 (1879); *Dygert v. Schenck*, 23 Wend. 446 (1840); *People v. Kerr*, 27 N. Y. 188, 193 (1863). Any unauthorized continuous obstruction of a public highway is a public nuisance; but that which is authorized by competent legal authority cannot constitute a nuisance. *Davis v. Mayor, etc., of New York*, 14 N. Y. 506 (1856).

The owner of the fee of a highway, if he erect a dock to navigable water thereon, creates a nuisance if the dock prevents public travel and it may be removed; if it does not obstruct travel it becomes part of the street. *City of Buffalo v. D., L. & W. R. R.*, 190 N. Y. 84 (1907), reversing 11 App. Div. 915, N. Y. Supp.

An obstruction of a highway by which the public is deprived of its use constitutes a nuisance. But the cases in which indictments have been sustained for such a nuisance, or suits in equity maintained for the removal of obstructions, are those in which there has been a permanent encroachment, or some threatened or actual injury to the public works, or such a permanent and continued occupation of the highway for a purpose foreign to and inconsistent with its use by the public as to the amount to a permanent obstruction. *People v. Horton*, 64 N. Y. 610 (1876); *Tinker v. N. Y. Ontario & Western R. Co.*, 157 N. Y. 312 (1898); *People v. Cunningham*, 1 Den. 524 (1845); *Attorney-General v. Cohoes Co.*, 6 Paige, 133 (1836). A person maintaining a nuisance in a highway is liable for any damages to a person who by reason thereof has sustained a special injury. For instance an individual who receives a bodily injury or suffers damages to his horses or carriage in consequence of a collision with an obstruction in the highway may maintain an action against the person responsible for the obstruction. But the injury to be actionable must be special in its nature and not a damage which is sustained by the rest of the community as well. *Lansing v. Smith*, 8 Cow. 146 (1828); *Butler v. Kent*, 19 Johns. 223 (1821); *Pierce v. Dart*, 7 Cow. 609 (1827); *Mills v. Hall*, 9 Wend. 315 (1832); *Griffith v. McCullum*, 46 Barb. 565 (1866); *Harrower v. Ritson*, 37 Barb. 301 (1861). Such a nuisance may, doubtless, be abated by any private person injured thereby. *Strickland v. Woolworth*, 3 T. & C. 286 (1874); *Thompson v. Allen*, 7 Lans. 459 (1872); *McFadden v. Kingsbury*, 11 Wend. 667 (1834).

The ownership of the fee and right of possession necessarily carries with it the full use and enjoyment of the soil within the highway for every purpose not incompatible with the public use. The abutting owner may, therefore, through the portion of the highway not required for public travel, cultivate the soil, store upon it crops and deposit along the side of it muck or compose to be used upon the adjoining land. The owner would not be liable for injuries received by a person whose horse was frightened and becoming unmanageable ran out of the road upon the muck so piled and overturned the vehicle. *Sweet v. Perkins*, 115 App. Div. 784, 101 N. Y. Supp. 163 (1906). In this case it did not appear that the pile of muck was so located as to constitute in fact an obstruction in the highway. In every sense it must be understood that the right of the abutting owner is secondary to the rights of the traveling public. He can do nothing in or to the highway which will in any way constitute an injury to the highway or which will prevent the use of it to a reasonable width.

**Abatement of nuisance.** Statute does not abrogate common law remedy of abatement of nuisance, or abolish the proceedings by indictment. *Wetmore v. Tracy*, 14 Wend. 250 (1835). Trial by jury is a matter of right in an action to abate a nuisance and recover damages thereby. *Hudson v. Caryl*, 44 N. Y. 553 (1871). Denial of an encroachment must be in writing. *Lane v. Cary*, 19 Barb. 537 (1885).

**Continued obstruction of highway.** The occupation of a portion of a highway is a mere obstruction and nuisance, and not even if such occupation be continued for over twenty years is it justified; and no acquiescence on the part of the highway commissioners can deprive the public of the use of the whole roadway. *Driggs v. Phillips*, 103 N. Y. 77 (1886); *Wiseman v. Luckinger*, 84 N. Y. 44 (1881); *St. Vincent Orphan Asylum v. City of Troy*, 76

N. Y. 108 (1879); *Mills v. Hall*, 9 Wend. 315 (1832). So held of abutments placed in highway and maintained there over twenty years by a railroad. *Town of Windsor v. D. & H. C. Co.*, 92 Hun, 127, 36 N. Y. Supp. 863 (1895).

There is no such thing as a prescriptive right to maintain a public nuisance. *Mills v. Hall*, 9 Wend. 315 (1832). The doctrine of adverse possession does not apply to highways. *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381 (1890), affirmed 130 N. Y. 618.

**§ 53. Removal of obstructions from ditches, culverts and waterways.**— The town superintendent shall cause all ditches, culverts and waterways on state and county highways to be kept free from obstructions at all times. He shall also cause snow and ice to be removed from the culverts and waterways of such highways and the expense thereof shall be paid from the moneys levied and collected for the repair and improvement of highways, as provided by this chapter.

**Derivation.** This section is new. The State Engineer in his directions provided that all ditches, culverts and waterways on roads constructed pursuant to chapter 115 of the Laws of 1898, shall be kept free from obstructions at all times by the highway commissioner. See *Road Red Book*, (1906) p. 14. In the same connection the highway commissioners were also required to remove the snow and ice from culverts and waterways on such highways.

The services of the town superintendent under this section are not to be included as a part of the maintenance of State and county highways. The expense of removing obstructions from ditches, culverts and waterways is to be paid by the town in the same manner as the expense of maintaining a town highway. All other maintenance of State and county highways is subject to the provisions of article 7, *post*, and is to be paid for out of the moneys available for the maintenance of such highways.

**§ 54. Removal of noxious weeds and brush within the highways, and of obstructions caused by snow.**— It shall be the duty of the owner or occupant of lands situated along the highway to cut and remove the noxious weeds growing within the bounds of the highway, fronting such lands, at least twice in each year, once in the month of June, and once in the month of August. Unless otherwise directed by the commission, it shall be the duty of such owner or occupant to cut and remove all briars and brush, growing within the bounds of the highway, fronting such lands, once in the month of August in each year. It shall also be the duty of such owner or occupant to remove brush, shrubbery and other obstructions within the bounds of the highway, causing the drifting of snow upon said highway, before the first day of November in each year. If such owner or occupant fails to cut or remove such weeds or brush, or to remove such brush, shrubbery or other obstructions, causing the drifting of snow, as provided herein, the

town superintendent of the town in which said lands are situated shall cause the same to be done, and the expense thereby incurred shall be paid in the first instance out of moneys levied and collected and available therefor, and the amount thereof shall be charged against such owner or occupant, and levied and collected, as provided in section fifty-five.

**Derivation.** This section is taken from section 53a of the former Highway Law, as amended by L. 1907, chap. 648. The part of this section relating to the assessment of the cost of removal against owners of land is contained in section 55.

**Removal by town superintendent; notice.** If the owner or occupant fails to remove noxious weeds, briars, brush and obstructions causing the drifting of snow, within the time specified in this section, it is the duty of the town superintendent to cause them to be removed after the expiration of such time, and the cost thereof is to be assessed against such owner or occupant as provided in section 55. Such cost is payable by the supervisor, on the order of the town superintendent after audit by the town board as provided in section 106, out of funds raised for miscellaneous highway purposes. The statute does not require a notice to the owner or occupant of the abutting lands, although the town superintendent may serve such a notice if he sees fit.

The notice, if given, may be in the following form:

#### FORM No. 12.

##### Notice to Remove Weeds, Briars and Brush.

To Levi French, owner [or occupant] of [briefly describe premises] situated along the highway [give location of highway] in the town of \_\_\_\_\_, county of \_\_\_\_\_.

You are hereby notified and required to cut and remove the noxious weeds [or briars and brush] growing within the bounds of the above described highway fronting the premises owned [or occupied] by you, at some time during the month of June, 19\_\_\_\_ [or, in August, as the case may be] [or, in case of briars and brush, "at some time during the month of August"] as required by section 54 of the Highway Law. If you refuse or neglect to remove such weeds [or briars and brush] within such time, I will cause the same to be removed and assess the cost thereof against you as authorized by section 55 of the Highway Law.

Dated, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

ALLAN SMITH,

*Town Superintendent of Highways, Town of \_\_\_\_\_.*

**Destruction of noxious weeds.** The electors of a town may, at a biennial town meeting, make provision and allow rewards for the destruction of noxious weeds either in or out of the highways and raise money therefor. Town Law, § 22, subd. 5. Under section 12, subdivision 7 of the County Law boards of supervisors are authorized to make such laws and regulations as they may deem necessary for the destruction of wild and noxious weeds within the county.

§ 55. **Assessment of cost against owners and occupants.**—The town superintendent shall assess the cost of,

1. Removing obstructions and moving and resetting poles and wires, pursuant to section fifty-two.

2. Cutting and removing noxious weeds, briars and brush and removing brush, shrubbery and other obstructions within the highways, causing the drifting of snow, pursuant to section fifty-four, against the owner, occupant or company neglecting to perform the duty imposed by the sections above referred to. Such town superintendent shall serve personally or by mail upon such owner, occupant or company, a written notice, stating that at a time and place specified therein, he will assess such cost against the owner, occupant or company neglecting to perform such duty. Such notice shall be served at least eight days previous to the time specified therein. If directed against a company, it may be served upon it at its principal place of business, or upon an agent of the company within the town. At the time and place so specified, he shall hear the parties interested, and shall thereupon complete the assessment, stating therein, the name of each owner, occupant or company, and the amount assessed against him or it, and shall return such assessment to the town clerk who shall present the same to the town board of his town, at its meeting held on the Thursday preceding the annual meeting of the board of supervisors. Such town board shall certify such assessment to the board of supervisors who shall cause the amount stated therein to be levied against such owner, occupant or company and any uncollected tax shall be a lien upon the land affected. The amount so levied shall be collected in the same manner as other taxes levied by such board, and shall be paid to the supervisor of the town, to be applied in reimbursing the fund from which such cost was defrayed.

**Derivation.** This section is new in form. The provision relating to the assessment of the cost of removing noxious weeds and brush, and obstructions causing the drifting of snow, upon abutting owners, are contained in section 53a of the former Highway Law. Under section 105 of the former Highway Law a neglect or refusal of the owner or occupant of lands abutting upon highways to remove obstructions or encroachments subjected such owner or occupant to a forfeiture of twenty-five dollars.

**Notice of assessment.** The notice that the town superintendent will assess the cost of removing such obstructions, poles and wires or of cutting and removing such weeds, briars, etc., may be served, personally or by mail, upon the owner, occupant or company, on account of the neglect of whom the work was done. A service upon a telegraph or telephone operator within the



town would be sufficient in the case of a telegraph or telephone company. A copy of each notice should be endorsed with date of service and how and by whom served, and be returned by the town superintendent with the assessment to the town clerk. Such notice may be in the following form:

**FORM No. 13.**

**Notice of Assessment.**

To Levi French, owner or occupant of [describe briefly the lands] abutting on the highway [briefly locate highway] in the town of \_\_\_\_\_, county of \_\_\_\_\_ [or to The D. & E. Telephone Co., owner of telephone poles and wires erected within the bounds of \_\_\_\_\_ highway].

You are hereby notified that the undersigned, town superintendent of highways of the town of \_\_\_\_\_, will assess the cost of cutting and removing the noxious weeds [or briers and brush] [or in case of an obstruction, "of removing an obstruction consisting" (describe obstruction), or, in case of telegraph and telephone poles and wires, "of moving and resetting poles and wires"] within the bounds of the highway above described, on the day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ in the village of \_\_\_\_\_, as provided and authorized by section 55 of the Highway Law, and that at the time and place specified he will hear all parties interested and complete the assessment as provided in such section.

Dated, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

ALLAN SMITH,

*Town Superintendent of Highways, Town of \_\_\_\_\_.*

**Assessment of cost of removing weeds, etc.** The assessment of the cost of removing such weeds, briers, brush, obstructions, poles and wires must be made as provided in this section; by the town superintendent. No other town officer has anything to do with the completion of the assessment. When completed it is to be returned to the town clerk and by him submitted to the town board, whose only duty consists of certifying it to the board of supervisors.

Such assessment may be in the following form:

**FORM No. 14.**

**Assessment of Cost of Removing Weeds, Etc.**

To Abel Jones, town clerk of the town of \_\_\_\_\_.

The undersigned, town superintendent of highways of the town of \_\_\_\_\_, hereby certifies that he caused to be removed the noxious weeds [brush or briers] in front of the lands owned [or occupied] by the person named in the following list, as authorized and required by section 54 of the Highway Law; [if obstructions were removed, add: "that he caused obstructions consisting of (describe them) to be removed from the highway in front of the premises of (name person)"; or if poles and wires were moved and reset, also add: "that he caused to be moved and reset the poles and wires of the \_\_\_\_\_ Company in the highway located (describe location of poles and wires)"]; that he caused due notice to be served upon each of the persons named in such list, a copy of which with an endorsement of the date and manner of service is returned herewith; that at the time and place

mentioned in such notice he heard such owners, [occupants or company] and all others interested, and assessed the cost of cutting and removing such noxious weeds [and of removing such obstructions, and of moving and resetting such poles and wires] against the owner [occupant or company] whose duty it was, pursuant to section 54 of the Highway Law, to cut and remove [or remove, or move and reset] the same; that such completed assessment is as follows:

Name of owner or occupant.	Premises described.	Character of work.	Cost.
Abram Smith.....	Farm lands.....	Cutting and removing weeds....	\$7 50
John Ring.....	House and lot.....	Removing logs and lumber.....	6 15
A. & E. Telephone Co..	Telephone poles.....	Moving poles.....	11 25

The above is a true statement of the actual cost of the work performed as above described.

Dated this            day of            , 19    .

JOHN DOOLEY,

*Town Superintendent of Highways, Town of*    .

To the Board of Supervisors, County of    .

The foregoing assessment has been returned by John Dooley, town superintendent of highways for the town of    , to the town clerk of such town and by him presented to us, as provided in section 55 of the Highway Law, and we hereby certify such assessment to you as required by such section.

[Signed by majority of members of town board.]

§ 56. **Wire fences to prevent snow blockades.**— The town superintendent, with the consent of the town board, may purchase wire for fences to be erected for the prevention of snow blockades, and the said town superintendent is hereby authorized to contract with the owners of the lands lying along the highways of their respective towns, at such points as are liable to snow blockade, for the removal of the fences now standing along the boundaries of such highways and the replacing of such fences with wire fences. He may contract to deliver to such land owners fence wire to be used in the construction of such fences, without charge to said land owners, at the place of purchase, but he shall not agree to pay any part of the cost of the removal or construction called for by said contracts, or to make any payment to said land owners, as a compensation for the construction of fences or for posts. The amount to be expended for the purchase of such wire shall not exceed the sum of three hundred dollars in any one year, and such amount shall be included in the estimate for expenditures for removal of obstructions caused by snow, and other miscellaneous purposes, and paid from the money levied and collected

therefor. The fences to be built, under the provisions of this section, shall be of not less than four strands of wire, nor more than nine strands, in the discretion of the town superintendent, approved by the town board, and the construction of said fences and their distance apart, shall be such as said town superintendent shall prescribe. Whenever such fence or fences shall become so out of repair as to be dangerous to animals passing along the highway, it shall be the duty of the owner or owners of said fence or fences to immediately repair or replace the same. Whenever the town superintendent shall contract for the removal of any fence, under the provisions of this section, he shall file in the office of the town clerk a description of that portion of the highway to which said contract shall apply, and thereafter it shall not be lawful for any person to replace the fence so contracted to be removed, with any fence liable to cause the drifting of snow. In no case shall the town superintendent approve of or permit the use of barb wire for such fences.

**Derivation.** This section is taken from L. 1890, chap. 291, §§ 1-5, as amended by L. 1906, chap. 311. The former law provided for a submission of the question as to the purchase of wire to a town meeting; the present law permits the purchase with the consent of the town board. The former law has been rewritten but the substance of it is retained in this section.

The amount to be raised should be included in the estimate made by the town superintendent as provided in section 90, subdivision 4, *post*. Expenditures are to be made after audit by the supervisor upon an order drawn by the town superintendent in favor of the person from whom the wire was purchased. See section 106, *post*.

The contract for the delivery of wire to be used in replacing fences causing the drifting of snow is not required by this section to be in writing, but it would be better practice for the town superintendent to enter into a written contract with each owner, and file the same, with the description of the place where the fence is to be erected in the office of the town clerk. Such contract may be in the following form:

#### FORM No. 15.

##### Contract for Delivery of Wire.

*Know all men by these presents*, that whereas, John Doe, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, has purchased wire, with the consent of the town board of such town, for fences to be erected for the prevention of snow blockades at certain points in the highways of such town.

*Now therefore* the said John Doe, town superintendent of the town of \_\_\_\_\_, aforesaid, does hereby agree by and with Ethan Allen of the said town, that he will deliver to the said Allen a sufficient amount of fence wire for the erection of a wire fence consisting of [not less than four nor



other labor as may be necessary to keep such rivers, streams or creeks within their proper channels, and to prevent their encroachment upon highways or abutments of bridges.

3. Upon the lands adjoining a highway which, during the spring freshets or at a time of highwater are subject to overflow from such rivers, streams or creeks, to remove or change the position of a fence or other obstruction preventing the free flow of water under or through a highway, bridge or culvert, whenever the same may be necessary for the protection of such highway or bridge.

4. Upon any lands adjacent to highways to remove any fence or other obstruction which causes snow to drift in and upon such highways, and erect snow fences or other devices upon such lands to prevent the drifting of snow in or upon such highways.

**Derivation.** The part of the above section relating to entry upon lands for the opening or digging of ditches is from the former Highway Law, § 27, as added by L. 1906, chap. 101. The provisions, relating to the entry upon lands to prevent overflow and to removal of fences and other obstructions causing the drifting of snow, was taken from Highway Law, § 4, subd. 8.

**State and county highways.** Lands adjacent to a State or county highway may be entered upon and occupied for the purpose of opening or constructing a drain or ditch so as to properly drain such highway, as provided in section 135, *post*; the damages for such entry are to be paid as provided in section 136, *post*.

§ 58. **Damages to owners of lands.**—Where lands are entered upon under the provisions of the preceding section, the town superintendent shall agree with the owner of such lands, subject to the approval of the town board, as to the amount of damages, if any, sustained by such owner in consequence of such entry in performance of the work authorized by such section, and the amount of such damages shall be a town charge. If the town superintendent is unable to agree with such owner upon the amount of damages thus sustained the amount thereof shall be ascertained, determined and paid in the manner that damages are so ascertained, determined and paid, where new highways are laid out and opened and the town superintendent and land owners are unable to agree upon the amount thereof.

**Derivation.** This section is taken from the second and third sentences of section 27 of the former Highway Law, as added by L. 1906, chap. 101. Former Highway Law, § 4, subd. 8, as amended by L. 1904, chap. 478, provided for the assessment of damages where entry was made upon adjacent lands for the purpose of driving spiles and performing such other labor as might be necessary to keep rivers and streams within their proper channels.

**Ascertainment of damages.** Where the town superintendent is unable to agree with the owners of lands as to the damages caused by entry thereupon, the section contemplates that commissioners shall be appointed by the county judge for the determination of such damages and the proceedings before such commissioners are to be the same as are provided in Article 3, sections 192-204, in respect to damages for laying out a new highway.

§ 59. **Damages for change of grade.** — In any town in which a town highway shall be repaired, graded and macadamized from curb to curb by the authorities of the town the owner or owners of the land adjacent to the said highway shall be entitled to recover from the town the damages resulting from any change of grade. A person claiming damages from such change of grade must present to the town board of such town a verified claim therefor within sixty days after such change of grade is effected. The board may agree with such owner upon the amount of damages to be allowed him. If no agreement be made within thirty days after the presentation of the claim, the person presenting it may apply to the supreme court for the appointment of three commissioners to determine the compensation to which he is entitled. Notice of the application must be served upon the supervisor of the town at least ten days before the hearing thereof. All proceedings subsequent to the appointment of commissioners shall be taken in accordance with the provisions of the condemnation law so far as applicable. Such town board, or such commissioners, shall, in determining the compensation, consider the fair value of the work done, or necessary to be done, in order to place the claimant's lands, or buildings, or both, in the same relation to the changed grade as they stood to the former grade, and make awards accordingly, except that said board or said commissioners may make an allowance for benefits derived by the claimant from such improvement. The amount agreed upon for such damages, or the award therefor together with the costs, if any, allowed to the claimant, shall be a charge against such town and the supervisor shall pay the same, if there be sufficient funds in his hands available, and if not, the town board shall borrow money for the payment thereof, as provided in section ninety-seven, or issue certificates of indebtedness therefor, as provided in section ninety-six. Bonds of the town to raise the money necessary to make such payment, and such bonds or such certificates of indebtedness shall bear a rate of interest not ex-

ceeding five per centum per annum payable semi-annually. Such bonds shall be in the same form, and shall be issued and sold in the same manner as other town bonds.

**Derivation.** This section is derived from section 11a of former Highway Law, as added by L. 1903, chap. 610, as amended by L. 1904, chap. 443, and L. 1906, chap. 530.

**Retroactive effect of former law.** Section 11a of the former Highway Law, as added by L. 1903, chap. 610, was held to include highways that had been theretofore or were thereafter graded. Such section was amended by L. 1904, chap. 443, so as to embrace only those highways which were regraded in the future. *Matter of Andersen*, 178 N. Y. 416 (1904), revg. 91 App. Div. 563, 87 N. Y. Supp. 24.

The present law will be construed as a continuation of section 11a of the former Highway Law, as amended by L. 1906, chap. 530 and all damages accruing under the former law may be proved under the present law as though the former law had not been repealed.

There is no restriction in the present law upon the right to damages in any case where a town highway shall be repaired, graded and macadamized from curb to curb by the authorities of the town. Under the former law it was held that it must be established that such improvement was done "in accordance with the provisions of section 69 of chapter 636 of the laws of 1892," the County Law. *Matter of Borup*, 89 App. Div. 183, 85 N. Y. Supp. 828 (1903). The present law makes no reference to such section, and under the case cited the petitioner need only establish that the highway was a town highway and that it has been "repaired, graded and macadamized from curb to curb by the authorities of the town."

A provision of a statute, authorizing a municipality to alter the grade of a highway, gives it no authority to withdraw any part of the highway from public use or to erect any nuisance thereon, such as a wall in front of an abutting owner's premises. *Hyland v. President, etc., of Ossining*, 57 Misc. 212, N. Y. Supp. (1907).

At common law an abutter had no claim for damages against a municipality for a change in the grade of a highway; and this rule is applicable even though access to his property might be cut off; in cities and incorporated villages the rule has been changed by statute; but in towns no remedy has been given except that contained in section 11a of the Highway Law. *Smith v. Boston & Albany R. R. Co.*, 90 App. Div. 94, 91 N. Y. Supp. 412 (1904).

The right to compensation is created by statute, and the statutory remedy is exclusive, and the measures of damage is determined by the terms thereof and cannot be assessed on the theory of a trespass. *Matter of Hoy v. Village of Salamanca*, 57 Misc. 31, 107 N. Y. Supp. 1208 (1907).

**Constitutionality.** The constitutionality of the original act was established in the case of *Matter of Borup*, 182 N. Y. 222, affirming 102 App. Div. 262, 92 N. Y. Supp. 624 (1905). It was there held that an award of damages not permissible except by virtue of the act was in no sense a gift or gratuity of the money of the town; that the Legislature had power to provide for the payment of damages in the original act; that the act authorized no new or

improper rule of damages; that the recovery is limited to the actual amount of damages, measured by the principles prevailing in condemnation proceedings.

The statute does not apply to the change of grade of a highway to carry it under a railroad in accordance with Railroad Law, §§ 62-69. *Smith v. Boston & Albany R. R. Co.*, 99 App. Div. 94, 91 N. Y. Supp. 412 (1904).

A verified claim for the damages sustained by a change of grade must be presented to the town board within sixty days after such change of grade is effected. A presentation of the claim to the supervisor of the town would be deemed a presentation to the town board, otherwise the purpose of the section might be defeated because of the fact that the town board did not meet for the audit of accounts within the prescribed period. The verified claim may be in the following form:

FORM No. 17.

Verified Claim for Damages for Change of Grade.

Town of \_\_\_\_\_, county of \_\_\_\_\_.

To Asa Bird, Dr.

For damages sustained by him in the change of grade of the town highway in the town of \_\_\_\_\_, running from [give location of highway], adjacent to premises owned by him in such town, caused by repairing, grading and macadamizing such highway from curb to curb by the authorities of the said town of \_\_\_\_\_, which change of grade was effected on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\$1,000.

ASA BIRD,

*Claimant.*

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } ss.:

Asa Bird being duly sworn deposes and says that he is the claimant mentioned in the foregoing claim against the town of \_\_\_\_\_, that the damages claimed therein to have been sustained by him by the change of grade therein specified have been in fact actually sustained by him, and that no part thereof has been paid or satisfied.

ASA BIRD.

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

JOHN JONES,

*Notary Public* [or other proper officer].

§ 60. Drainage, sewer and water pipes, cattle passes or other crossings in highways.—The town superintendent may, with the consent of the town board, upon the written application of any resident of his town or a corporation, grant permission for an overhead or underground crossing or to lay and maintain drainage, sewer and water pipes under ground within the portion therein described of a town highway. If the highway is a state



or county highway such permission shall be granted with the consent of the county or district superintendent instead of the town board. Permission shall not be granted for the laying and maintaining of such pipes under the travelled part of the highway, except across the same, for the purposes of sewerage and draining swamps or other lands, and supplying premises with water. Such permission shall be granted upon the condition that such pipes and hydrants or crossings shall be so laid, set or constructed as not to interrupt or interfere with public travel upon the highway, and upon the further condition that the applicant will replace the earth removed and leave the highway in all respects in as good condition as before the laying of said pipes, or construction of such crossings, and that such applicant will keep such pipes and hydrants or crossing in repair and save the town harmless from all damages which may accrue by reason of their location in the highway, and that upon notice by the town superintendent the applicant will make the repairs required for the protection or preservation of the highway. The permit of the town superintendent, with the consent of the town board or county or district superintendent, and the acceptance of the applicant, shall be executed in duplicate, one of which shall be filed in the office of the town clerk and the other in the office of the district or county superintendent. In case the applicant shall fail to make any of the repairs required to be made under the permit, they may be made by the town superintendent at the expense of the applicant, and such expenses shall be a lien, prior to any other lien, upon the land benefited by the use of the highway for such pipes, hydrants or structures. The town superintendent may revoke such permit upon the applicant's failure to comply with any of the conditions contained therein.

**Derivation.** This section is taken from the former Highway Law, § 14, as amended by L. 1897, chap. 204. There is no substantial change in the part thereof which pertains to the laying of drainage and water pipes in highways. The part permitting the construction of overhead or underground crossings is new. If the highway is a county or State highway the permission is granted by the town superintendent with the consent of the county or district superintendent. This provision is new.

**Use of highway by transportation corporations.** Water companies upon obtaining the permit of a town board authorizing the formation of such company for the purpose of supplying the town with water, may lay and maintain their pipes and hydrants in the streets, highways and public places of the town in which such permit is secured. See Transportation Corporations

Law §§ 80, 82. Pipe-line corporations may construct pipe-lines along public highways with the consent of the town superintendent of highways. See Transportation Corporations Law, § 45. Gas and electric light corporations, may, with the consent of the town board, lay gas pipes and electric conduits in the streets and highways of the town, see Transportation Corporations Law, § 61.

**Effect of present law.** This section as contained in the former Highway Law, was probably limited in its application to persons and corporations other than those referred to in the Transportation Corporations Law. As the section now stands, however, it would seem that any corporation, seeking to use the highways of the town for the purposes for which they were organized, must also secure the permission of the town superintendent and the consent of the town board, in case of a town highway, and the consent of the county or district superintendent in case of a State or county highway.

**Supervision of town superintendent.** Under the former law a contract between a waterworks' company and a town was under consideration. Such contract provided for the furnishing of water to the town and its inhabitants and contained a provision that the company's pipes should be laid under the supervision of the commissioners of highways, their services to be paid for by the company. It was held that the contract was not invalid because of the clause requiring payment of compensation of the commissioners by the company. It was stated that such a provision is questionable, however, and required close scrutiny by the court; the burden in such a case is upon the company to show that the contract is just and fair and has been justly and fairly carried out; slight evidence of improper or unfair execution of duty on the part of the commissioners, or of failure to perform the contract by the company would require a finding of a fraudulent motive for its insertion. *Nicoll v. Sands*, 131 N. Y. 19 (1892).

**Application and consent to use highways for the purposes specified in this section may be in the following form:**

#### FORM No. 18.

##### Application.

To the Town Superintendent of Highways of the Town of \_\_\_\_\_, County  
of \_\_\_\_\_ :

The undersigned, a resident of the said town of \_\_\_\_\_, [or, a corporation organized under and pursuant to the Transportation Corporations Law (or other act under which incorporated) having its principal place of business in the city (or village) of] hereby makes application to you for permission to lay and maintain water pipes and hydrants [or sewer or drainage pipes] underground within the portion of the highway in said town hereinafter described, pursuant to the provisions of section 60 of the Highway Law. The portion of such highway wherein such pipes are to be laid is as follows: [describe in detail the portion of the highway wherein the pipes are to be laid.]

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 . . .

LEVI COONS,

## FORM No. 19.

## Permission to Lay and Maintain Pipes, Etc.

The undersigned, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, upon the written application of Levi Coons, a resident of the said town [or, of the Smithville Waterworks Company, a corporation duly organized pursuant to the laws of the State of New York], presented to him as provided by section 60 of the Highway Law, does hereby grant permission to the said Levi Coons [or, the said Smithville Waterworks Company] to lay and maintain water pipes and hydrants [or, drainage, or sewer pipes, as the case may be] in and under that portion of the highways of such town described as follows: [describe the portion of the highways where the pipes and hydrants are to be placed.]

Such permission is granted subject to the following conditions: Such pipes [and hydrants] are to be so placed as not to interrupt or interfere with public travel upon the highway; the said Levi Coons [or Smithville Waterworks Company] will replace the earth removed and leave the highway in all respects in as good condition as before the laying of such pipes; that he will keep such pipes [and hydrants] in good repair, and save the town harmless from all damages which may accrue by reason of their location in the highway, and that upon notice by the town superintendent he will make the repairs required for the protection and preservation of the highway; that upon the failure of the said applicant to make such repairs, they may be made by the town superintendent at the expense of the said applicant, and such expense shall be a lien prior to any other lien upon the land benefited by the use of the highway, for such pipes [and hydrants]. The said town superintendent may, upon the failure of the said applicant to comply with any of the conditions contained herein, revoke this permit and remove such pipes [and hydrants] from the highway.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

JOHN ALLEN,

*Town Superintendent of Highways of the Town of \_\_\_\_\_.*

I hereby agree to conform to the conditions contained in the foregoing permission.

LEVI COONS.

The undersigned, members of the town board of the town of \_\_\_\_\_, hereby consent to the grant of the foregoing permission.

[Signed by majority of members of town board.]

[If the highway is a State or county highway, the consent must be given by the county or district superintendent.]

§ 61. Trees and sidewalks.—The town superintendent may, by an order in writing, approved by a majority of the members of the town board, authorize the owners of property adjoining the highways, at their own expense, to locate and plant trees and locate and construct sidewalks along the highways, in conformity with the topography thereof, which order with a map or diagram, showing the location of the sidewalk and tree planting, certified

by the town superintendent, shall be filed in the office of the town clerk, within ten days after the making of the order.

**Derivation.** This section is taken from former Highway Law, § 43. The requirement of approval by the town board is new.

**Shade trees; other statutory provisions.** As to allowance for setting out shade trees, see section 63, *post*. As to custody of shade trees, see section 64, *post*. Shade trees belong to the owners of the abutting lands, section 298, *post*. As to penalty for injury to fruit or shade trees, see section 294, *post*. As to penalty for falling trees into the highway, see section 295, *post*.

**Willful injury to shade trees.** A person who willfully cuts down, girdles or otherwise injures a fruit, shade or ornamental tree standing on the lands of another, or of the people of the State, is guilty of a misdemeanor. Penal Code, § 640, subd. 2.

**Sidewalks.** A person who willfully and without authority or necessity drives any team, vehicle, cattle, sheep, horse, swine or other animal upon a sidewalk is punishable by a fine of \$50, or imprisonment in the county jail not exceeding thirty days, or both. Penal Code, § 652.

**Right to plant and maintain shade trees.** In addition to the ordinary easements of light, air and access, an abutting owner may, on a country highway, plant shade trees, cultivate the sides of the road and do anything to improve or beautify it or his own property so long as his acts do not impair the public right of passage. *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522 (1896); reversed on other grounds, 158 N. Y. 231; *Jackson v. Hathaway*, 15 Johns. 447 (1818); *Edsall v. Howell*, 83 Hun, 424, 33 N. Y. Supp. 392 (1865); *Evans v. Board of Street Commissioners*, 84 Hun, 206, 32 N. Y. Supp. 547 (1895). Town authorities cannot arbitrarily cut down trees planted in a street or highway by an abutting owner; the latter is entitled to maintain them there, unless some proper street or highway use requires their removal, or they are condemned for public use and paid for. *Ellison v. Allen*, 62 N. Y. St. Rep. 274, 30 N. Y. Supp. 441 (1894). And injunction will lie to prevent their unnecessary removal. *Evans v. Board of Street Commissioners*, 84 Hun, 206, 32 N. Y. Supp. 507 (1895). Even where the abutter does not own the fee of the highway, he may recover for injury to shade trees planted by him therein with the consent of the municipal authorities. *Lane v. Lamke*, 53 App. Div. 395, 65 N. Y. Supp. 1090 (1900).

Trees planted in a highway, the fee of which belongs to adjacent owners, are the property of such owners, who may remove them at pleasure; and the Legislature cannot impose a penalty upon him for removing them unless the public have acquired title by making him compensation for them. *Village of Lancaster v. Richardson*, 4 Lans. 136 (1871). Trees lawfully set and maintained in the highway are neither encroachments nor obstructions, and the court has no power to compel their removal. *Town of Wheatfield v. Shasley*, 23 Misc. 100, 51 N. Y. Supp. 835 (1898).

The setting of trees on the side of a highway, in accordance with the statute, is not such an occupation as can be made the foundation of a claim to title by adverse possession as against the true owner. *Bliss v. Johnson*, 94 N. Y. 234 (1883).

**Rights of electric corporations in respect to shade trees.** In stringing its wires a corporation has no right to cut branches of trees belonging to abut-

ting owners, unless such course is demanded by an existing necessity which cannot be avoided by insulating the wires or by employing other practical means which may be more expensive and less convenient. *Van Sielen v. Jamaica Electric Light Co.*, 45 App. Div. 1, 61 N. Y. Supp. 210 (1899). The right to the protection of shade trees vested in the owners of adjoining lands is subservient to the proper and legitimate use of the highway by the public. For instance, where an electric light company has secured the consent of the proper authorities for the erection of its poles and the stringing of its wires, such owners cannot complain if the company, in the reasonable exercise of its legitimate powers, trims or injures such trees. The question as to whether or not the use of public highways in the country by electric lighting companies is within the proper public use of such highways is, in all cases, to be determined by the necessity of the light for the proper use of such highways. *Farmer v. Larchmont Electric Co.*, 158 N. Y. 231 (1899).

**Sidewalks are a part of the highway**, and the owner of adjoining land has no greater duty in regard to keeping them in repair than any other part of the highway. *Village of Fulton v. Tucker*, 3 Hun, 529 (1875); *Clapper v. Town of Waterford*, 131 N. Y. 382 (1892).

This section does not deprive highway officers of their control over every part of the highway; so held where an overseer removed earth, to repair center of highway, from a portion on the side of the highway laid out by the abutting owner as a sidewalk. *Anderson v. Van Tassel*, 53 N. Y. 631 (1873).

**Defective sidewalks.** Sidewalks are constructed under the Highway Law for use in hamlets and unincorporated villages. The purposes for which they are constructed and maintained are the same as in the case of villages, and when so constructed there is the same liability for defects therein. The controlling principle in the case of injuries caused by defective sidewalks is stated in the case of *Saulsbury v. Village of Ithaca*, 94 N. Y. 27 (1883), where it is said: "It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets, is a matter of discretion not to be regulated by the courts; yet when a sidewalk is built with or without its permission it becomes responsible for its condition, and is bound, so long as it exists, to keep it in order." So in the case of *Birngruber v. Town of Eastchester*, 54 App. Div. 80, 66 N. Y. Supp. 278 (1900), the court held where a town constructs a highway with a sidewalk for the use of the inhabitants of any unincorporated village, the duty to keep the sidewalk in proper order for travel applies to the same extent as to the center of the street.

The order authorizing owners of property to locate and plant trees, and to locate and construct sidewalks may be in the following form:

**FORM No. 20.**

**Order Authorizing Planting of Trees or Construction of Sidewalks.**

STATE OF NEW YORK, }  
 COUNTY OF                    } ss.:

This is to certify that the undersigned, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, has hereby authorized A. K., an owner of lands adjoining the highway [give general description of

highway], at his own expense, to locate and plant trees [or, locate and construct a sidewalk] along such highway adjoining premises owned by him, in conformity with the topography of such highway, and in accordance with a map or diagram hereto attached and made a part thereof.

Dated this                    day of                    , 19 .

L. M. TOWN,

*Superintendent of Highways, Town of*

The undersigned, a majority of the members of the town board of the town of                    , hereby approve of the foregoing order.

[Signatures of majority of town board.]

[A map or diagram showing location of highway and lands in front of which trees and sidewalks are to be located, and the location of the trees to be set out and the sidewalk to be built, must be made and filed with the order in the office of the town clerk.]

**§ 62. Expenditures for sidewalks.**— The town superintendent of any town may, with the consent of the town board, maintain and repair existing sidewalks in such town, and the expense thereof shall be a town charge. The town board of any such town may on the petition of not less than twenty-five taxpayers of the town, by resolution, direct the town superintendent to construct a sidewalk along a described portion of any highway of the town, in a manner and not exceeding an expense to be specified in the resolution, and the expense of constructing such sidewalk shall be a town charge, and shall be paid in the same manner as other town charges.

**Derivation.** This section is derived from that part of section 45 of the former Highway Law, as amended by L. 1904, chap. 588, which pertains to the expenditure of money in towns which had adopted the money system, for the construction of sidewalks.

**Petition and resolution.** The petition must be in writing signed by at least twenty-five taxpayers whose names appear on the last preceding town assessment-roll, and addressed to the town board. The resolution should be formally adopted by the town board at one of its regular meetings. The petition and resolution may be in the following form:

**FORM No. 21.**

**Petition for Construction of Sidewalk.**

To to the Town Board of the Town of                    :

The undersigned taxpayers of the town of                    , whose names appear on the assessment-roll of such town for the year 19                    , hereby respectfully request that you, by resolution, direct the town superintendent of highways of such town to construct a sidewalk, as authorized and provided by section 62 of the Highway Law, along that portion of the highway of such town, described as follows [describe in detail the place where it is desired that sidewalks should be constructed.]

Dated this                    day of                    , 19 .

[Signatures of taxpayers.]

## FORM No. 22.

## Resolution of Town Board.

*Resolution* directing the town superintendent of highways to construct a sidewalk, passed pursuant to section 62 of the Highway Law.

*Whereas* a petition has been presented to this board by at least twenty-five taxpayers of the town of \_\_\_\_\_, requesting the construction of a sidewalk along that portion of the highways of said town hereinafter described, therefore

*Resolved*, that \_\_\_\_\_, town superintendent of highways, is hereby directed to construct, at the expense of the town of \_\_\_\_\_, as authorized by section 62 of the Highway Law, a sidewalk along that portion of the \_\_\_\_\_ highway described as follows: [describe place or places where sidewalk is to be constructed]. That such sidewalk shall be of stone flagging [specify material and manner of laying walk, if desired] of a width of \_\_\_\_\_ feet, and the entire expense of constructing such sidewalk shall not exceed the sum of \_\_\_\_\_ dollars.

[This resolution should be entered by the town clerk on the minutes of the town board, and a certified copy thereof submitted to the town superintendent.]

§ 63. Allowance for shade trees.— There shall be allowed by the town superintendent, with the consent of the town board, to each such owner or occupant, who shall set out or transplant by the side of the highway adjoining his premises, any forest shade trees, fruit trees, or nut bearing trees suitable for shade trees, in conformity with the preceding section, the sum of one dollar for each three living trees so set out or transplanted, to be paid by the supervisors to such owner or occupant, upon the order of the town superintendent out of moneys levied and collected for miscellaneous purposes. Such allowance shall only be made for trees so set out or transplanted during the preceding year, and living and well protected from animals at the time of the allowance. Such trees shall be set out or transplanted not more than eight feet from the outside line of any highway three rods wide, and not more than one additional foot distant therefrom, for each additional rod in width of highway, and not less than seventy feet apart, on the same side of the highway, if elms, or fifty feet, if other trees. Trees transplanted by the side of the highway, in place of trees which have died, shall be allowed for in the same manner.

*Derivation.* This section is derived from section 44 of the former Highway Law. The allowance is increased by the present law from one dollar for four trees to one dollar for three trees. Under the former law the allowance was made an abatement of the owner's highway tax. Under the present law the allowance, if made, is payable to the owner of the land out of moneys

levied and collected for miscellaneous highway purposes. The abatement of highway tax under the former law was limited to one-fourth of the annual highway tax of the owner; under the present law there is no limitation upon the amount of the allowance.

§ 64. **Custody of shade trees.**— The town superintendent shall have the full control of all shade trees in the public highways of the town, but not within the limits of an incorporated village, and shall prosecute complaints for malicious injury to, or unlawful acts concerning, public shade trees. Upon the recommendation of the town superintendent, the town board may, by resolution, appropriate a sum, not exceeding two hundred dollars, to be known as the "Shade Tree Fund." Such fund shall be placed in the hands of the supervisor as custodian, and shall be expended by him upon the written order of the town superintendent, for the setting out and preservation of shade trees along the highways in such town.

**Derivation.** This section is derived from Town Law, § 45, as added by L. 1905, chap. 502. Said section reads as follows: "Twenty-five or more persons residing in any town and assessed upon the last preceding assessment-roll thereof may file with the town clerk a petition for the appointment of a tree warden in such town. Within thirty days after the filing of such petition, the town board may appoint a tree warden to serve for one year from the date of such appointment. He shall receive a reasonable compensation for his services to be fixed by the town board. He shall have the full care and control of all public shade trees in the town, and shall prosecute complaints for malicious injury to, or unlawful acts concerning, public shade trees. He shall have charge of the expenditure of any public money appropriated or granted for setting out shade trees in the town. A town board of a town in which a tree warden is appointed may, by resolution, appropriate annually not exceeding \$200, to be known as the shade tree fund, and which shall be used and expended by the tree warden for the setting out and preservation of shade trees along the highways in such town." This section of the Town Law is probably superseded by the above section, since it is there provided that the town superintendent in all towns shall have full control of shade trees in the public highways, thus dispensing with the necessity of the appointment of a tree warden.

§ 65. **Compensation for watering troughs.**— The town superintendent may, with the consent of the town board, authorize the owner or occupant of lands to construct and maintain a watering trough beside the public highway, to be supplied with fresh water, the surface of which shall be three or more feet above the level of the ground and easily accessible for horses with vehicles, but when possible, all such watering troughs shall be constructed on



the lower side of the highway. Such watering trough shall be maintained by such owner or occupant and kept supplied with fresh water. The town superintendent shall annually give a written order upon the supervisor for three dollars to be paid to such owner or occupant by the supervisor, for maintaining such watering trough, and keeping the same supplied with fresh water, out of moneys levied and collected for miscellaneous purposes.

**Derivation.** This section is derived from former Highway Law, § 48, modified by eliminating provisions applicable to the former labor system. The provision requiring the trough to be on the lower side of the highway is new. Under the present section the surface of the trough is required to be three or more feet above the level of the ground, while under the old law it was required to be two or more feet above such level.

**Abatement of toll for watering trough.** Where a watering trough is constructed and maintained by an owner of premises along a turnpike or plankroad, the company owning such plankroad or turnpike must abate the toll of such owner in the annual sum of three dollars. The town superintendent of the town in which the watering trough is constructed must designate the watering troughs along such plankroad or turnpike necessary for public convenience. See L. 1869, chap. 131, §§ 2 and 3, as added by L. 1872, chap. 274, *post*.

The order for the payment of the money allowed for the construction and maintenance of a watering trough may be in the same form as other orders drawn by the town superintendent upon the supervisor. The annual estimate of the town superintendent submitted by him to the town board as provided in section 90, *post*, should contain provision for the payment of claims for watering troughs.

The order, being based upon the authority to construct and maintain a watering trough, granted by the town superintendent with the consent of the town board, may be paid by the supervisor as directed in this section without formal audit by the town board. The audit required by section 106 does not apply to such orders.

A written certificate should be given by the town superintendent to the person authorized to construct and maintain a watering trough, so that there may be some evidence showing that the proper authority has been granted. This certificate may be in the following form:

**FORM No. 23.**

**Certificate of Authority.**

STATE OF NEW YORK, }  
 COUNTY OF            } ss.:

This is to certify that John Doe, residing in the town of \_\_\_\_\_, is hereby authorized to construct and maintain a watering trough beside the highway adjacent to lands owned [or occupied] by him in accordance with the provisions of section 65 of the Highway Law at a place therein described as follows: [describe place in highway] and so long as such watering trough is maintained by him and kept supplied with fresh water he is en-

titled to the sum of three dollars payable each year by the supervisor of such town upon the order of the town superintendent of highways.

In witness whereof I have this                      day of                      , 19                      , set my hand.

JAMES RICH,

*Town Superintendent of Highways for the Town of*                      .

The undersigned members of the town board of the town of                      , hereby consent to the foregoing grant of authority to the said John Doe for the construction and maintenance of a watering trough as provided therein.

[Signatures of a majority of the members of the town board.]

§ 66. **Credit on private road.**—Any person living upon a private road may be credited on account of his highway taxes in any year an amount equal to the value of the work which the town superintendent may deem necessary to be done in such year upon such road. The town superintendent shall issue to him a statement containing the name of the person, the location of the road, the amount of work so deemed necessary to be done, and the value thereof. Such statement shall be presented to the town board at its annual meeting for the audit of town accounts, and if approved by such board, and such work shall have been done, an order shall be issued directing the supervisor to pay the sum specified in such statement to the person therein named, or his assignee, out of moneys in the hands of the supervisor available for highway purposes. The amount so paid in any year shall not exceed the amount payable by the person named in such statement on account of moneys levied in such town for the repair and improvement of highways as provided in this chapter. This section shall not apply to private roads or rights of way over lands of the owner thereof used by him for his own convenience.

**Derivation.** This section is derived from former Highway Law, § 37, as amended by L. 1906, chap. 149, so far as such section pertains to credit to be given on private roads in towns where the money systems of taxation had been adopted.

**Private roads are to be laid out** as provided in sections 211–225, *post*. The use of a private road is prescribed by section 226, *post*. The private roads for the working of which credit may be given under this section are those which have been duly constituted as such by grant, prescription, necessity, or by statutory proceeding.

**The statement** required by this section must be made by the town superintendent after an investigation by him of the amount of work which, in his opinion, should be done each year on the private road in order to make it passable. The statement should be in writing and may be in the following form:

## FORM No. 24.

## Statement of Credit on Private Road.

The undersigned, town superintendent of highways of the town of \_\_\_\_\_, hereby states that John Doe is a resident and taxpayer of said town; that he lives on a private road [give location of road]; that the work necessary to be done on such private road during the year 19\_\_\_\_ consists of [describe work which the superintendent deems necessary]; that the value thereof is \$ \_\_\_\_\_, and that the said John Doe is entitled to an order upon the supervisor of such town for such amount because of such work.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

JAMES RICH,

*Town Superintendent of Highways, Town of \_\_\_\_\_.*

§ 67. Neglect or refusal to prosecute.— If the town superintendent shall neglect or refuse to prosecute for any penalty, knowing the same to have been incurred, he shall be liable to a penalty of ten dollars for every such neglect or refusal, which shall be recovered by action in the name of the town, by the supervisor, or by any taxpayer of the town who shall indemnify the town for the costs and expense of the action, in such manner as the supervisor may approve.

**Derivation.** Section 23 of the former Highway Law prescribed a penalty for the failure of the commissioner of highways to prosecute for a penalty imposed upon an overseer of highways. This section extends the liability of a town superintendent so that he may be made liable for a failure to prosecute any penalty imposed by this act.

**Collection of penalties.** This section evidently has reference to the duty of the town superintendent to collect all penalties prescribed by this chapter as required by section 47, subdivision 12.

As to penalties prescribed in this chapter and the disposition of penalties when collected, see note to subdivision 12 of section 47.

For actions to recover penalties under the former law, see *Bentley v. Phelps*, 27 Barb. 524 (1858); *McFadden v. Kingsbury*, 11 Wend. 667 (1834); *Bartlett v. Crozier*, 17 Johns. 439 (1820); *Haywood v. Wheeler*, 11 Johns. 432 (1814).

§ 68. Erection of guide boards.—The town superintendent may, with the consent of the town board, cause guide posts with proper inscriptions and devices to be erected at the intersections of such highways therein, as may be necessary, which shall be kept in repair by him at the expense of the town. Upon written application to him, of five resident taxpayers of any town or twenty resident taxpayers of the county in which such town is located, requesting the erection of one or more guide boards at the intersection of highways in such town, it shall be his duty to cause to

be erected at the intersections mentioned in such application, such guide boards indicating the direction, distances and names of the towns, villages or cities to or through which such intersecting highways run. Such application shall designate the highway intersections at which such guide boards are requested to be erected, and may contain suggestions as to the inscriptions and devices to be placed upon such boards. The cost of the erection and maintenance of such boards shall be a town charge. If the town superintendent refuses or neglects for a period of sixty days after receiving such application to comply with the request contained therein, he shall, for such neglect or refusal, forfeit to the town, the sum of twenty-five dollars, to be recovered by the supervisor in the name of the town, and the amount so recovered shall be set apart for the erection of such guide boards.

**Derivation.** This section is derived from former Highway Law, § 5, as amended by L. 1895, chap. 330. The provision as to milestones is omitted. Under the former law commissioners of highways were authorized to erect such guide posts as they might deem necessary. Under the present law the consent of the town board is required.

**Other provisions relative to milestones and guideposts.** A willful or malicious injury to mileboards, milestones or guideposts is punishable by imprisonment for two years. Penal Code, § 639, subd. 6.

Whoever shall injure, deface or destroy a milestone or guidepost erected on any highway shall, for every such offense, forfeit treble damages. See section 290, *post*. It is thus provided that a person who injures a milestone or guidepost may be proceeded against either criminally under the Penal Code, or civilly under the Highway Law. As to erection of milestones and guideposts by turnpike and plankroad companies, see Transportation Corporations Law, § 136, *post*.

**State and county highways.** In the preparation of maps, plans, specifications and estimates for the construction or improvement of State and county highways provision must be made for the erection of suitable guideposts. See section 125, subdivision 7, *post*.

**The expense of erecting and maintaining guideboards** is made by this section a town charge and is payable by the supervisor upon the order of the town superintendent after audit by the town board, as provided in section 106, *post*.

**Application** for the erection of guideboards may be made to the town superintendent by five resident taxpayers of the town or twenty resident taxpayers of the county. Such application may be in the following form:

#### FORM No. 25.

##### Application for Erection of Guideboards.

To \_\_\_\_\_, Town Superintendent of Highways of the Town of \_\_\_\_\_ :  
 The undersigned, resident taxpayers of the town of \_\_\_\_\_, [or twenty  
 resident taxpayers of the county of \_\_\_\_\_], do hereby request, pursuant

to section 68 of the Highway Law, that you erect guideboards at the following intersections of highways in such town: [describe intersections of highways where guideboards are desired]. That such guideboards indicate the direction, distances, and names of the towns, villages or cities to or through which such intersecting highways run. We suggest that the following inscriptions and devices be placed upon such guideboards at the places indicated: [state distinctly the inscriptions which should be placed upon the guideboard at each intersection.]

Dated this                    day of                    , 19 .

[Signatures of taxpayers.]

**§ 69. Measurement of highways and report.**— Within six months after the taking effect of this chapter, and as often as the commission shall direct, the town superintendent shall measure all highways of his town. Such measurements shall be made either by the use of a cyclometer or otherwise as the commission shall direct. He shall ascertain, and indicate in his report, the town highways which have been surfaced with gravel, those which have been surfaced with crushed stone and those which have been shaped and crowned. He shall report in triplicate, on forms to be prescribed and furnished by the commission, the total mileage of all highways within his town, specifying as above provided as to town highways, one of which shall be filed with the town clerk, one with the district or county superintendent, and one with the commission.

**Derivation.** This section is new.

**Object of section.** The information as to the number of miles of highways within the town are required to be made to the commission so as to enable them to prepare the table required by section 15, subdivision 12. The highway mileage of each town is the basis of determining the amount to be paid by the State to aid the towns in the repair and improvement of town highways, see section 101, *post*; and also in determining the amount to be paid by the town and county toward the construction of county highways. See section 141, *post*.

**§ 70. Application for service of prisoners.**— After satisfying himself that proper quarters can be secured, the town superintendent may, with the consent of the town board, request the supervisor of the town, under the provisions of section ninety-three of the county law, to procure the services of prisoners serving sentence in the county jail, for general work upon the public highways of the town.

**Derivation.** This section is new, but simply provides machinery for carrying out an old provision of the County Law.

**Employment of prisoners of county jails on highways.** That part of section 93 of the County Law relating to the employment of prisoners on highways

is as follows: "Such keeper may, with the consent of the board of supervisors of the county, or the county judge, from time to time, cause such of the convicts under his charge as are capable of hard labor to be employed outside of the jail in the same, or in an adjoining county, upon such terms as may be agreed upon between the keepers and the officers, or persons, under whose direction such convicts shall be placed, subject to such regulations as the board or judge may prescribe; and the board of supervisors of the several counties are authorized to employ convicts under sentence to confinement in the county jails, in building and repairing penal institutions of the county and in building and repairing the highways of their respective counties, or in preparing the materials for such highways for sale to and for the use of such counties or towns, villages and cities therein; and to make rules and regulations for their employment; and the said board of supervisors are hereby authorized to cause money to be raised by taxation for the purpose of furnishing materials and carrying this provision into effect; and the courts of this State are hereby authorized to sentence convicts committed to detention in the county jails to such hard labor as may be provided for them by the boards of supervisors."

Employment of State prison convicts upon public highways. Laws of 1894, chapter 266, relates to the employment of State prison convicts upon public highways and provides as follows:

"§ 1. The superintendent of state prisons may employ or cause to be employed, not to exceed three hundred of the convicts confined in each state prison in the improvement of the public highways, within a radius of thirty miles from such prison and outside of an incorporated city or village.

"§ 2. The agent and warden of each prison may make such rules as he may deem necessary for the proper care of such prisoners while so employed, subject to the approval of the superintendent of state prisons.

"§ 3. The agent and warden of each prison may designate, subject to the approval of the superintendent of state prisons, the highways and portions thereof upon which such labor shall be employed; and such portions so designated and approved shall be under his control during the time such improvements are in progress, and the state engineer and surveyor shall fix the grade and width of the roadway of such highways and direct the manner in which the work shall be done.

"§ 4. The superintendent of state prisons is hereby authorized to purchase any machinery, tools and materials necessary in such employment.

"§ 5. Any person interfering with or in any way interrupting the work of any convict employed pursuant to this act, upon the public highways, or any person giving or attempting to give any intoxicating liquors, beer, ale or other spirituous beverage to any state prison convict so employed, shall be guilty of a misdemeanor. Any officer or keeper of any state prison having in charge the convicts employed upon such highways, may arrest without a warrant any person violating any provision of this section." [Inserted by L. 1894, chap. 664.]

§ 71. Construction and repair of approaches to private lands.—The owners or occupants of lands shall construct and keep in repair all approaches or driveways from the highway, under the

direction of the district or county superintendent, and it shall be unlawful for such owner or occupant of lands to fill up any ditch or place any material of any kind or character in any ditch so as to in any manner obstruct or interfere with the purposes for which it was made. The town superintendent may, when directed by the town board, construct and keep in repair such approaches and the expense thereof shall be a town charge.

**Derivation.** This section is new.

**Ditches, culverts and waterways in State and county highways** are required to be kept open and free from obstructions at all times by the town superintendent. See section 53, *ante*, p. .

**Duties respecting approaches or driveways on to private property.** The Attorney-General, in 1902, said: "Under the Highway Law it is made the duty of the highway commissioner to keep the highways of the town in repair, and if, to accomplish such purpose, it becomes necessary to construct a ditch within the bounds of a highway, in order to keep the water out of the road, the commissioner has the power to do so. I do not understand that any burden or responsibility rests upon the town authorities to construct approaches, entrances or driveways off from the highway on private property. Such matters must be attended to and provided for by persons desiring and entitled to use the same, and without unnecessary injury or obstruction of the highway or any part thereof." Report of Attorney-General (1902) 277. Under this section it is made the duty of owners and occupants of land to construct and keep in repair approaches to driveways from the highway on to their lands.

§ 72. **Unsafe toll bridge.**—Whenever complaint in writing, on oath, shall be made to the town superintendent, of any town in which shall be in whole or in part any toll bridge belonging to any person or corporation, representing that such toll bridge has from any cause become and is unsafe for the public use, such town superintendent shall forthwith make a careful and thorough examination of such toll bridge, and if upon the examination thereof he shall be of the opinion that the same has from any cause become dangerous or unsafe for public use, he shall thereupon give immediate notice to the owners of such toll bridge, or to any agent of such owners, acting as such agent in respect to such bridge, that he has, on complaint made, carefully and thoroughly examined the bridge, and found it to be unsafe for public use. Such owners shall thereupon immediately commence repairing the same, and cause such repairs to be made within one week from the day of such notice given, or such reasonable time thereafter as may be necessary to thoroughly repair the bridge, so as to make it in all respects safe and convenient for public

use. For neglect to take prompt and effective measures so to repair the bridge, its owners shall forfeit twenty-five dollars, and shall not demand or receive any toll for using the bridge until the same shall be fully repaired. The town superintendent shall cause such repairs to be made and the owners of the bridge shall be liable for the expense thereof, and for the services of the superintendent, and upon the neglect or refusal to pay the same upon presentation of an account therefor, the town superintendent may recover the same by action, in the name of the town.

**Derivation.** This section is taken from former Highway Law, § 13.

**Toll bridge corporations.** Rights, duties and liabilities of toll bridge corporations in respect to toll bridges are set forth in Transportation Corporations Law, §§ 122-150, post.

The complaint and notice provided for in this section may be in the following form:

**FORM No. 26.**

**Complaint of Unsafe Toll Bridge.**

STATE OF NEW YORK, }  
COUNTY OF            } ss.:

Richard Young, a resident of the town of \_\_\_\_\_, being duly sworn, complains under oath, as provided in section 72 of the Highway Law, and states that the toll bridge in the town of \_\_\_\_\_, belonging to the company, crossing the \_\_\_\_\_ river [or stream] on the highway at [describe place] has become and is unsafe for public use; that the reasons why such bridge is unsafe are as follows: [state reasons why bridge is unsafe].

Wherefore, the said Richard Young respectfully requests that James Rich, the town superintendent of highways of the town of \_\_\_\_\_ make a careful and thorough examination of such bridge, and if he is of the opinion that the same has, from any cause, become unsafe for public use, that he shall give notice to \_\_\_\_\_ company, the owner of such toll bridge, to repair the same and make it in all respects safe and convenient for public use.

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

RICHARD YOUNG.

JOHN SMITH,  
*Notary Public.*

**FORM No. 27.**

**Notice to Owners.**

To \_\_\_\_\_ [owner or agent] of the [describe bridge] toll bridge:

You are hereby notified that the undersigned, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, has, on complaint on oath duly made by Richard Young, a resident of the town of \_\_\_\_\_, county of \_\_\_\_\_, carefully and thoroughly examined the toll bridge owned by you, situated on the \_\_\_\_\_ highway at [describe location], and has found it to be unsafe for public use; and you are hereby directed



to cause such repairs to be made as will render such bridge safe and convenient for public use.

Dated this                      day of                      , 19                      .

JAMES RICH,

*Town Superintendent of Highways, Town of*                      .

§ 73. **Actions for injuries to highways.**— The town superintendent shall bring an action in the name of the town, against any person or corporation, to sustain the rights of the public, in and to any town highway in the town, and to enforce the performance of any duty enjoined upon any person or corporation in relation thereto, and to recover any damages sustained or suffered, or expenses incurred by such town, in consequence of any act or omission of any such person or corporation, in violation of any law or contract in relation to such highway.

**Derivation.** This section is taken from former Highway Law, § 15.

**Action in name of town.** An action brought by the town superintendent of highways or other town officer must be in the name of the town. Town Law, § 182. Regardless of what the law formerly was which permitted commissioners of highways to prosecute certain actions in their own name of office, such an action, as the law now stands, can only be prosecuted in the name of the towns of which they are officers. *Town of Palatine v. Canajoharie W. S. Co.*, 90 App. Div. 548, 86 N. Y. Supp. 412 (1904). Such an action is not barred by the fact that defendant recovered judgment in a similar action improperly brought by the commissioner in his own name instead of in the name of the town. *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898).

**When action will lie.** A town may maintain an action to restrain a traction company from tearing up and obstructing its highways without lawful authority, and compel it to restore, to its former condition a portion of the highway so torn up. *Town of Eastchester v. N. Y., W. & C. Tract. Co.*, 30 Misc. 571, 63 N. Y. Supp. 1032 (1900). An electric light company may be compelled to remove from streets, poles, wires and lamps abandoned by it. *Village of Hempstead v. Ball Electric Co.*, 9 App. Div. 48, 41 N. Y. Supp. 124 (1896). An action will lie for destruction or obstruction of a bridge. *Town of Palatine v. Canajoharie W. S. Co.*, 90 App. Div. 548, 86 N. Y. Supp. 412 (1904); *Town of Fort Covington v. U. S. & C. R. R. Co.*, 8 App. Div. 223, 40 N. Y. Supp. 313, affirmed 156 N. Y. 702 (1896). Action may be brought by trustees of village constituting a separate highway district. *Village of Hempstead v. Ball Electric Co.*, 9 App. Div. 48, 41 N. Y. Supp. 124 (1896); *Village of Oxford v. Willoughby*, 181 N. Y. 155 (1905).

The town superintendent is authorized to maintain an action in the name of the town for equitable relief from an act which amounts to a public nuisance. *Village of Haverstraw v. Eckerson*, 192 N. Y. 54 (1908) affirming 124 App. Div. 13, N. Y. Supp.

Drainage commissioners may be compelled, under this section, to bridge a channel for drainage of swamp land, cut by them across a highway, although

the statute under which they act gives them no power in terms to construct such a bridge. *Town of Conewango v. Shaw*, 31 App. Div. 354, 52 N. Y. Supp. 327 (1898). Where a mill owner digs a raceway through a highway and builds a bridge over it, he is primarily liable to repair the bridge, and where it becomes unsafe, it is a nuisance which the town may, upon the refusal of the owner, abate by itself repairing the bridge, and this expense may be recovered by the town from the owner of the mill, although it appears upon the trial that he had no actual notice that there was any obligation resting on him to keep the bridge in repair. *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898).

An individual, who has suffered special injury, may maintain a private action to restrain a railroad from obstructing a highway. *Buchholz v. N. Y. Lake Erie & W. R. R. Co.*, 148 N. Y. 640 (1896); reversing 66 Hun, 377, 21 N. Y. Supp. 503 (1892); *People ex rel. Cochen v. Dettmer*, 26 App. Div. 327, 49 N. Y. Supp. 877 (1898). And the proceeding is entirely independent of the remedy given by the Highway Law. *People ex rel. Bacon v. N. C. Ry. Co.*, 164, 289 (1900). Injunction will lie on the petition of an individual suffering special injury. *People ex rel. Cochen v. Dettmer*, 26 App. Div. 327, 49 N. Y. Supp. 877 (1898). But where a nuisance is public and no private person has sustained special injury, the action must be maintained by the town superintendent in the name of the town. *Griffith v. McCullum*, 46 Barb. 561 (1866).

**Pleadings.** Sufficiency of the complaint; see *Town of Palatine v. N. Y. C. & H. R. R. Co.*, 22 App. Div. 181, 47 N. Y. Supp. 1024 (1897); *Town of Eastchester v. N. Y. W. & C. Tract. Co.*, 30 Misc. 571, 63 N. Y. Supp. 1032 (1900). Irrelevancy; see *Town of Dunkirk v. L. S. & M. S. R. Co.*, 75 Hun, 366, 27 N. Y. Supp. 105 (1894).

The preservation of lateral support to a highway, as constructed and prepared for public use, is an obligation to the community which rests upon the adjacent landowner; it is of no matter whether the fee is in the public or not. And where such owner affects the lateral support of the highway by excavating upon his lands the equitable power of the court may be invoked. *Village of Haverstraw v. Eckerson*, 192 N. Y. 54 (1908), affirming 124 App. Div. 18. N. Y. Supp.

**Restoration of highway by railroad.** A railroad corporation which for the purpose of its railroad injures or interferes with the highway must restore such highway to its former state, or to such a state as to not unnecessarily impair its usefulness. Railroad Law, § 11 *post*. Such section of the Railroad Law, by imposing upon a railroad company the duty of restoring the highway "to its former state or to such state as to not unnecessarily impair its usefulness does not relieve the town superintendent from the care and control of those parts of the public highways constituting approaches to railroad crossings, although constructed by the railroad company in discharge of its statutory duty. The town superintendent is authorized to institute proceedings to compel the company to fully perform this duty or when it is in default he may proceed and do the necessary work and maintain an action against the company for the expense. *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892). If a railroad company fails to comply with its statutory duty in respect to restoration of highway, an action may be brought under this

section of the Highway Law; but the remedy thereby afforded is not exclusive and does not supersede common law remedies and the railroad company may be proceeded against by mandamus, or by indictment for maintaining a nuisance. *People v. N. Y. Central & H. R. R. Co.*, 74 N. Y. 302 (1878); *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 152 (1874).

The superintendent of highways has no power to dictate how the restoration shall be made, although it may maintain an action for a proper performance of the duty or for damages by the town. *Post v. West Shore R. R. Co.*, 123 N. Y. 580 (1890).

The duty imposed upon a railroad corporation, which has constructed a crossing over a highway to restore the highway to its former state or to such a state as will not unnecessarily impair its usefulness, is a continuous one and an action brought by the town to compel the performance of such duty cannot be barred by the statute of limitations. Where the crossing, as constructed, constitutes an encroachment it is not necessary for the town superintendent to declare it to be an encroachment and institute proceedings under the statute for the removal thereof. The existence of the encroachment for the period of upwards of twenty years did not limit the public to the use of the space left free and the company may, notwithstanding such continuous use, be compelled to restore the highway to its proper width. *Town of Windsor v. D. & H. C. Co.*, 92 Hun, 127, 36 N. Y. Supp. 863 (1895).

The court may require by mandamus the performance of the duty to remove obstructions and restore the highway and may in the writ point out in what the corporation has failed of its duty and direct particularly what must be done that it may not fail again. *People ex rel. Green v. D. & C. R. R. Co.*, 58 N. Y. 152 (1874); *People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302 (1878).

For other cases relating to the duty of a railroad company to restore a highway to its former condition, see *Schild v. Central Park, etc., R. R. Co.*, 133 N. Y. 447 (1892); *Allen v. Buffalo, R. & P. R. Co.*, 151 N. Y. 434 (1897); *Conklin v. N. Y. Ont & W. R. R. Co.*, 102 N. Y. 107 (1886); *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98 (1886); *Masterson v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 247 (1881); *McMahon v. S. A. R. R. Co.*, 75 N. Y. 231 (1878); *Wiley v. Smith*, 25 App. Div. 351, 49 N. Y. Supp. 934 (1898); *Hatch v. Syracuse, B. & N. Y. R. R. Co.*, 24 N. Y. St. Rep. 36, 4 N. Y. Supp. 509 (1888).

A street railroad company is required by section 11 of the Railroad Law to restore the highways to the condition in which they were before the railroad was constructed; and it is made the duty of the town superintendent, by this section, to compel such company to make such restoration and in case of a failure he may bring an action in the name of the town against the company. Report of Attorney-General (1902) 230.

Application to villages. Since section 141 of the Village Law constitutes a village a "separate highway district," the trustees of a village may maintain an action under this section to prevent an encroachment upon a village street. *Village of Oxford v. Willoughby*, 181 N. Y. 155 (1905).

§ 74. Liability of towns for defective highways.—Every town shall be liable for all damages to person or property sustained by

reason of any defect in its highways or bridges, existing because of the neglect of any town superintendent of such town. No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action shall have been presented to the supervisor of the town within six months after the cause of action accrued. And no such action shall be commenced until fifteen days after the service of such statement.

**Derivation.** This section is derived from former Highway Law, § 16 without change. Such section of the former law was derived from L. 1881, chap. 700, § 1. This section provided that "The several towns in this state shall be liable to any person suffering the same, for all damages to person or property by reason of defective highways or bridges in such town, in cases in which the commissioner or commissioners of highways of said towns are now by law liable therefor, instead of such commissioner or commissioners of highways." It will be noticed that in section 16 of the former law the words "instead of such commissioner or commissioners of highways" were omitted. The act of 1881 evidently was for the purpose of substituting a liability of the town for that of the commissioner. Section 16 of the former Highway Law continued the liability as to the town but eliminated the clause referred to. There was no provision in the original act of 1881, requiring the presentation of a verified statement of the cause of action.

Section is not unconstitutional upon the ground that the highways are for the public and not for local use, and that highway commissioners are not the representatives or agents of the town in any sense, and, therefore, there is no legislative power to charge the property of its citizens with the consequences of the misconduct and negligence of those officers. The statute by method of equable apportionment and distribution of the burden it operates upon the community, has no relation to the individual, but concerns the public and is for the public benefit. *Bidwell v. Town of Murray*, 40 Hun, 190, 196 (1886).

At common law prior to the act of 1881, the town was in no way responsible for injuries resulting from defects in the highways; and even after the courts held that the commissioners were subject to such liability, the town was still held exempted, for the commissioner of highways was not an agent of the town in its corporate capacity, and the latter was not chargeable for his nonfeasance or misfeasance or for his official acts or delinquencies. *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310 (1878); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Morey v. Town of Newfane*, 3 Barb. 645 (1850); *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895); *Matter of Certain Freeholders*, 46 Hun, 620 (1887); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895); *McGuinness v. Town of Westchester*, 66 Hun, 356, 21 N. Y. Supp. 290 (1892); *Frazier v. Town of Tompkins*, 30 Hun, 168 (1883); *Monk v. Town of New Utrecht*, 104 N. Y. 552 (1887); *Flynn v. Hurd*, 118 N. Y. 19 (1889); *Embler v. Town of Wallkill*, 57 Hun, 384, 10 N. Y. Supp. 797 (1890); *Albrecht v. County of Queens*, 84 Hun, 399, 32 N. Y. Supp. 473 (1895); *Bartlett v. Crozier*, 17 Johns. 439, 451 (1820); *Lorillard v. Town of Monroe*, 11 N. Y. 392 (1854).

By the act of 1881 (chap. 700) the town was made liable where the liability for injuries resulting from neglect to keep the highways in repair rested primarily on the highway commissioner. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892). But the liability of the town is commensurate only with that of the commissioner before the passage of the act of 1881, and to hold the town liable it must be shown that the proximate cause of the injury was an omission of the commissioner to use ordinary care. However that enactment did not change the powers or duties of the commissioner and the town is liable only when negligence on the part of the commissioner is clearly shown. *Clapper v. Town of Waterford*, 131 N. Y. 382, 389 (1892); *Robinson v. Town of Fowler*, 80 Hun, 101, 61 N. Y. St. Rep. 791 (1894); *Eveleigh v. Town of Hounsfield*, 34 Hun, 140 (1884); *Lane v. Town of Hancock*, 142 N. Y. 510 (1894); *Riley v. Town of Eastchester*, 18 App. Div. 94, 45 N. Y. Supp. 448 (1897); *Fay v. Town of Lindley*, 11 N. Y. Supp. 355 (1890); *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895); *Waller v. Town of Hebron*, 5 App. Div. 577, 39 N. Y. Supp. 381 (1896); *Barber v. Town of New Scotland*, 88 Hun, 522, 34 N. Y. Supp. 968 (1895), affirmed 147 N. Y. 722; *Farman v. Town of Ellington*, 46 Hun, 41 (1887), affirmed 124 N. Y. 662; *Bidwell v. Town of Murray*, 40 Hun, 190 (1886); *Lawson v. Town of Woodstock*, 20 Wk. Dig. 570 (1884); *Young v. Town of Macomb*, 11 App. Div. 480, 42 N. Y. Supp. 351 (1896); *Albrecht v. County of Queens*, 84 Hun, 309, 32 N. Y. Supp. 473 (1895); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895); *Osterhout v. Town of Bethlehem*, 55 App. Div. 198, 66 N. Y. Supp. 845 (1900).

**Negligence of town superintendent.** The town is not liable for the superintendent's negligence in constructing a temporary bridge on private lands, pending repair of the highway bridge; the commissioner's act was done not in his official capacity. *Ehle v. Town of Minden*, 70 App. Div. 275, 74 N. Y. Supp. 903 (1902). So where lands of an adjoining owner are flooded through negligence of the superintendent to remove rubbish from a sluice, the town is not liable. *Winchell v. Town of Camillus*, 109 App. Div. 341, 95 N. Y. Supp. 688 (1905) affirmed 190 N. Y. 536. It is only defects in the highway, existing because of the negligence of the town superintendent for which the town may be made liable.

The town in its corporate capacity cannot nor is it required to repair a highway; that is a function wholly within the jurisdiction of the town superintendent; nor do the acts of 1881 and 1890 render it liable for the negligence of the commissioner while engaged in repairing a highway; those statutes merely give a right of action for damages occasioned by a defective highway and do not otherwise enlarge the liability of the town. *Robinson v. Town of Fowler*, 80 Hun, 101, 30 N. Y. Supp. 25 (1894); *People ex rel. Van Keuren v. Town Auditors*, 74 N. Y. 310 (1878); *People ex rel. Cole v. Cross*, 87 App. Div. 56, 61, 83 N. Y. Supp. 1083 (1903).

In an action for damages caused by a defect in a highway the plaintiff may prove, within reasonable limits, that such defect was caused by the delinquency of any town superintendent of highways, and is not restricted to proof of the delinquency of the particular superintendent in office at the time the damage occurred. *Kelley v. Town of Verona*, 97 App. Div. 488, 99 N. Y. Supp. 89 (1904).

**Defects due to negligence; degree of care.** Negligence when applied to a superintendent of highways is the omission, on his part, to use ordinary care, under all circumstances, in the performance of the duty imposed upon him by law which was the proximate cause of the accident; ordinary care is such care and conduct on the part of the superintendent as a reasonable and prudent person would ordinarily have exercised under the circumstances. *Lane v. Town of Hancock*, 142 N. Y. 510 (1894); *Sutphen v. Town of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128 (1894); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895); *Bostwick v. Barlow*, 14 Hun, 177 (1878).

Reasonable care in the construction and maintenance of highways is the measure of care resting upon the town superintendent of highways, and such municipalities are not liable for injuries resulting from accidents that are not to be anticipated in the exercise of reasonable forethought and prudence. The expression "reasonable care" is purely relative and must be applied to the circumstances of each particular case. *Snowden v. Town of Somerset*, 171 N. Y. 99 revg. 61 App. Div. 624, 70 N. Y. Supp. 1149 (1902).

The superintendent must exercise proper care in the maintenance of the highways in a reasonably safe condition for all travel. *Embler v. Town of Wallkill*, 57 Hun, 384, 10 N. Y. Supp. 797 (1890); *Glasier v. Town of Hebron*, 131 N. Y. 447 (1892); *Waller v. Town of Hebron*, 5 App. Div. 577, 39 N. Y. Supp. 381 (1896). And he owes no larger measure of duty to bicycle riders than to other travelers in ordinary vehicles. *Sutphen of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128 (1894). A mistake in judgment on the part of the superintendent after such careful consideration as the circumstances require is not negligence; it must be shown that negligence leads to the mistake in judgment. *Patchen v. Town of Walton*, 17 App. Div. 158, 45 N. Y. Supp. 145 (1897). The width and plan upon which a bridge is built is within the discretion of the commissioner, and cannot be reviewed by the court. *Lawson v. Town of Woodstock*, 20 Wk. Dig. 570 (1884).

The duty of the town superintendent is merely to use reasonable care to see that the highway is reasonably safe for travel. So where a vehicle pulling aside to avoid an automobile collides with a telephone pole placed out of the traveled part of the road, the town is not liable for the town superintendent allowing such pole to remain there. *Scofield v. Town of Poughkeepsie*, 122 App. Div. 863, 107 N. Y. Supp. 208 (1907).

While a municipal corporation owes a duty of active vigilance to see that its streets and highways are maintained in a fairly safe condition, yet what would be more than active vigilance under some circumstances, would be less than that amount under others. For instance a thronged city thoroughfare would require more attention than an ordinary highway running through a sparsely settled district of a town. *Glasier v. Town of Hebron*, 131 N. Y. 447 (1892); *Dorn v. Town of Oyster Bay*, 84 Hun, 510, 32 N. Y. Supp. 341 (1895); *Waller v. Town of Hebron*, 5 App. Div. 577, 39 N. Y. Supp. 381 (1896). The same degree of care and vigilance is required of a town superintendent of highways. *Embler v. Town of Wallkill*, 57 Hun, 384, 10 N. Y. Supp. 797 (1890); *Hicks v. Cheffie*, 13 Hun, 293 (1878); *Boyce v. Town of Shawangunk*, 40 App. Div. 593, 58 N. Y. Supp. 26 (1899).

The words "defective highways" are used in reference to their condition for public travel, and a highway may be rendered defective, no less by an

obstruction placed in it, than by a physical disturbance of the roadway. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891).

**Instances of defects in highways.** Branches of tree hanging so low over the roadway as to knock person from top of load of hay was held a defect in the highway. *Embler v. Town of Wallkill*, 57 Hun, 384, 10 N. Y. Supp. 797 (1890). Road scraper left in road at night. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40 (1891); and a banner suspended across street, found by the jury to be likely to frighten horses. *Champlin v. Village of Penn Yan*, 34 Hun, 33 (1884), affirmed 102 N. Y. 680; and a pile of stones at side of road having tendency to frighten horses. *Eggleston v. Columbia Turnpike Road Co.*, 82 N. Y. 278 (1880); and a wooden covering over sidewalk insecurely supported. *Hume v. Mayor*, 74 N. Y. 264 (1878); and stones outside of traveled portion of highway. *Newell v. Town of Stony Point*, 59 App. Div. 237, 69 N. Y. Supp. 583 (1901).

**Conditions not defects.** A hole or rut ten inches deep, caused by the natural wear of wagon wheels in the spring of the year, is not such a defect as to require repair by the town superintendent. *Osterhout v. Town of Bethlehem*, 55 App. Div. 198, 66 N. Y. Supp. 845 (1900). A rock two feet square, at a turn in the road, placed in close proximity to a fence which it is designed to protect, is not necessarily such a defect. *Hulse v. Town of Goshen*, 71 App. Div. 436, 75 N. Y. Supp. 723 (1902). So a hydrant, the nozzle of which projected out six inches over a twelve inch gutter. *Ring v. City of Cohoes*, 77 N. Y. 83 (1879).

The defects for which a town is liable are only those which interfere with travel on the highway, hence an adjoining owner whose lands are flooded through the stoppage of the sluice beneath a highway, has no cause of action against the town. *Winchell v. Town of Camillus*, 109 App. Div. 341, 95 N. Y. Supp. 688 (1905).

A town is not liable for damages caused to a person driving across a temporary bridge by reason of a defect therein, where it appears that such bridge was erected by the town superintendent on private lands under a license obtained by him from the owner thereof. In constructing such bridge the highway commissioner acted as a volunteer, and not in his official capacity. *Ehle v. Town of Minder*, 70 App. Div. 275, 74 N. Y. Supp. 903 (1902).

**Barriers.** Negligence on the part of the superintendent may consist as well in the omission to erect barriers in dangerous places in a highway as in leaving the bed of the highway defective; and the necessity for erecting barriers is a question of fact for the jury. *Ivory v. Town of Deerpark*, 116 N. Y. 476 (1889); *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Hyatt v. Trustees of Village of Rondout*, 44 Barb. 385 (1863); *Van Gaasbeck v. Town of Saugerties*, 82 Hun, 415, 31 N. Y. Supp. 354 (1894); *Fay v. Town Lindley*, 11 N. Y. Supp. 355 (1890).

The town superintendent is charged with guarding with barriers a cinder path used for bicycles, where not relieved of the care thereof. *Schell v. Town of German Flats*, 123 App. Div. 197, 108 N. Y. Supp. 219 (1908). The proximate cause of injuries received by a driver whose horse backed the wagon off an unguarded approach to a highway bridge, is the absence of a guard, and not the negligence of the town superintendent in removing a former guard.

Wallace v. Town of New Albion, 121 App. Div. 66, 105 N. Y. Supp. 524 (1907), affirmed 192 N. Y.

Absence of barrier excusable. Lane v. Town of Hancock, 142 N. Y. 510 (1894); Glasier v. Town of Hebron, 131 N. Y. 447 (1892); Monk v. Town of New Utrecht, 104 N. Y. 552 (1887); Patchen v. Town of Walton, 17 App. Div. 158, 45 N. Y. Supp. 145 (1897); Warner v. Village of Randolph, 18 App. Div. 458, 45 N. Y. Supp. 1118 (1897); Sutphen v. Town of North Hempstead, 80 Hun, 409, 30 N. Y. Supp. 128 (1894); Mack v. Town of Shawangunk, 98 App. Div. 577, 90 N. Y. Supp. 760 (1904); Hubbell v. City of Yonkers, 104 N. Y. 434 (1887).

It must be deemed settled that, as a general rule, the necessity for barriers, including the question whether the town superintendent was negligent in omitting to supply them, is a question of fact for the jury. Coney v. Town of Gilboa, 55 App. Div. 111, 67 N. Y. Supp. 116 (1900); Ivory v. Town of Deerpark, 116 N. Y. 476 (1889); Hewett v. Town of Thurman, 41 App. Div. 6, 58 N. Y. Supp. 83 (1899); Pelkey v. Town of Saranac, 67 App. Div. 337, 73 N. Y. Supp. 493 (1901); Wood v. Town of Gilboa, 76 Hun, 175, 27 N. Y. Supp. 586 (1894); Maxim v. Town of Champion, 50 Hun, 88, 4 N. Y. Supp. 515 (1888), affirmed 119 N. Y. 626 (1890); Wallace v. Town of New Albion, 121 App. Div. 66, 105 N. Y. Supp. 524 (1907), affirmed 192 N. Y.—.

The question as to whether a superintendent is guilty of negligence in failing to use lights indicating a trench opened by him in order to repair a sluiceway, and in guarding the opening by the construction of barricades at a distance therefrom, is for the jury to determine. Snowden v. Town of Somerset, 171 N. Y. 99, reversing 61 App. Div. 624, 70 N. Y. Supp. 1149 (1902).

**Notice of defect.** The defect must have existed for a sufficient period to raise a presumption that the town superintendent had notice thereof. A town superintendent cannot be charged with notice of a defect which had existed only for a few hours, and was so latent in character that a daily driver over the highway neither saw nor suspected any danger as he approached the place. Riley v. Town of Eastchester, 18 App. Div. 94, 45 N. Y. Supp. 448 (1897).

Actual notice of defect is not necessary where the circumstances are such that ignorance on the part of the superintendent is, in itself, negligence. Hover v. Barkhoof, 44 N. Y. 113 (1870); Bostwick v. Barlow, 14 Hun, 177 (1878); Boyce v. Town of Shawangunk, 40 App. Div. 593, 58 N. Y. Supp. 26 (1899). Where the defect existed four years, a superintendent upon taking office has constructive notice of its existence. Bullock v. Town of Durham, 64 Hun, 380, 19 N. Y. Supp. 635 (1892); Shaw v. Town of Potsdam, 11 App. Div. 508, 42 N. Y. Supp. 779 (1896); Allen v. Town of Allen, 33 App. Div. 463, 53 N. Y. Supp. 800 (1898). In order to impute constructive notice to the superintendent, the defect must have existed in a dangerous condition a sufficient time for the superintendent, in the exercise of reasonable care, to have discovered it. Osterhout v. Town of Bethlehem, 55 App. Div. 198, 66 N. Y. Supp. 845 (1900). The long continued existence of an excavation in a highway, without any guard around it, with actual knowledge thereof by the commissioner, is sufficient to establish negligence on his part. Smith v. Town of Clarkstown, 69 Hun, 155, 23 N. Y. Supp. 245 (1893); Allen v. Town of Allen, 33 App. Div. 463, 53 N. Y. Supp. 800 (1898); Rankert



v. Town of Junius, 25 App. Div. 470, 49 N. Y. Supp. 850 (1898); Foels v. Town of Tonawanda, 75 Hun, 363, 27 N. Y. Supp. 113 (1894).

**Lack of available funds as a defense.** It is a defense to an action for damages for injuries sustained in consequence of a defective highway to show that the superintendent was without adequate funds to make the repairs, or power or means of obtaining same. Clapper v. Town of Waterford, 131 N. Y. 382 (1892); Bryant v. Town of Randolph, 133 N. Y. 70 (1892); Ivory v. Town of Deerpark, 116 N. Y. 476 (1889); Monk v. Town of New Utrecht, 104 N. Y. 552 (1887); People *ex rel.* Everett v. Supervisors, 93 N. Y. 397 (1883); Hines v. Lockport, 50 N. Y. 236 (1872); Hover v. Barkhoof, 44 N. Y. 113 (1870); Garlinghouse v. Jacobs, 29 N. Y. 297 (1864); Quinn v. Town of Sempronius, 33 App. Div. 70, 53 N. Y. Supp. 325 (1898); Patchen v. Town of Walton, 17 App. Div. 158, 45 N. Y. Supp. 145 (1897); Smith v. Wright, 27 Barb. 621 (1857); Hyatt v. Trustees of Village of Rondout, 44 Barb. 385 (1863); People v. Comrs. of Highways of Hudson, 7 Wend. 474 (1831).

The above section does not change the rule formerly existing, that want of funds in the hands of the town superintendent with which to make the needed repairs, constituted a defense. A presumption that the town superintendent has funds with which to repair a defect is repelled by the fact that he sought to acquire funds from the town board for such purposes. Lee v. Town of Berne, 79 App. Div. 214, 80 N. Y. Supp. 107 (1903).

It is not sufficient for the town to show that the superintendent had no funds in his possession, but it must also be shown that he had sought through the proper channels to procure the same. Whitlock v. Town of Brighton, 2 App. Div. 21, 37 N. Y. Supp. 333 (1896), affirmed 154 N. Y. 781; Warren v. Clement, 24 Hun, 472 (1881); McMahon v. Town of Salem, 25 App. Div. 1, 49 N. Y. Supp. 310 (1898). In order to make the defense as to funds complete, it must appear not only that there was a lack of funds, but an inability, by the exercise of reasonable diligence, to obtain them. McMahon v. Town of Salem, 25 App. Div. 1, 49 N. Y. Supp. 310 (1898).

But where the superintendent has not sufficient funds to make all needful repairs, it is in his discretion to apply the funds at hand so as in his judgment the most necessary repairs can be made, and he is not responsible for an error of judgment in doing so. Monk v. Town of New Utrecht, 104 N. Y. 552 (1887); Young v. Town of Macomb, 11 App. Div. 480, 42 N. Y. Supp. 351 (1896). But his judgment in this respect must be reasonably exercised. Ivory v. Town of Deerpark, 116 N. Y. 476 (1889); Rhines v. Town of Royalton, 40 N. Y. St. Rep. 662, 15 N. Y. Supp. 944 (1891); Hyatt v. Trustees of Village of Rondout, 44 Barb. 385 (1863).

It is unnecessary to allege in the complaint that defendant had money with which to make repairs, though it may become necessary on the trial to prove the fact. Oakley v. Town of Mamaroneck, 39 Hun, 448 (1886); but see Smith v. Wright, 27 Barb. 621 (1857). Where a criminal indictment is brought against the officer for failure to make repairs want of funds must be averred in the indictment. People v. Adsit, 2 Hill, 619 (1842). But the necessity of this averment is limited to criminal cases. Adsit v. Brady, 4 Hill, 630 (1843). When the negligence charged was misfeasance, or want of care in construction, the want of funds is no defense. Rector v. Pierce, 3

T. & C. 416 (1874); *Shepherd v. Lincoln*, 17 Wend. 250 (1837); *Lament v. Haight*, 44 How. Pr. 1 (1872).

The burden is upon the superintendent to show that he both was without funds and had no power to raise them. *Bullock v. Town of Durham*, 64 Hun, 380, 19 N. Y. Supp. 635 (1892); *Getty v. Town of Hamlin*, 46 Hun, 1 (1887); *Bidwell v. Town of Murray*, 40 Hun, 190 (1886); *Boyce v. Town of Shawangunk*, 40 App. Div. 593, 58 N. Y. Supp. 26 (1899). The presumption that the superintendent had no funds is rebutted by the fact that, at the time he discovered repairs were needed, he took measures to acquire such funds by asking that the town board be called together. *Lee v. Town of Berne*, 79 App. Div. 214, 80 N. Y. Supp. 107 (1903). As to whether the superintendent had sufficient funds to make the repairs is a question for the jury. *Shaw v. Town of Potsdam*, 11 App. Div. 508, 42 N. Y. Supp. 779 (1896); *Getty v. Town of Hamlin*, 46 Hun, 1 (1887).

Evidence of repairs, made shortly after the accident, is competent to show that there were funds in the hands of the superintendent at the time of the accident. *Stone v. Town of Poland*, 58 Hun, 21, 11 N. Y. Supp. 498 (1890).

**Contributory negligence.** *Bryant v. Town of Randolph*, 133 N. Y. 70 (1892); *Ivory v. Town of Deerpark*, 116 N. Y. 476 (1889); *Monk v. Town of New Utrecht*, 104 N. Y. 552 (1887); *Patchen v. Town of Walton*, 17 App. Div. 158, 45 N. Y. Supp. 145 (1897); *Lawson v. Town of Woodstock*, 20 Wk. Dig. 570 (1884); *Sutphen v. Town of North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128 (1894); *Spencer v. Town of Sardinia*, 42 App. Div. 472, 59 N. Y. Supp. 412 (1899); *Rankert v. Town of Junius*, 25 App. Div. 470, 49 N. Y. Supp. 850 (1898); *Hewett v. Town of Thurman*, 41 App. Div. 6, 58 N. Y. Supp. 83 (1899); *Wood v. Town of Gilboa*, 76 Hun, 175, 27 N. Y. Supp. 586 (1894); *Weed v. Village of Ballston Spa*, 76 N. Y. 329 (1879); *Boyce v. Town of Shawangunk*, 40 App. Div. 593, 58 N. Y. Supp. 26 (1899); *Foels v. Town of Tonawanda*, 75 Hun, 363, 27 N. Y. Supp. 113 (1894).

A person traveling upon a highway is, as a general rule, justified in assuming that it is safe; and where he is injured in consequence of a defect, previous knowledge of its existence does not, *per se*, establish negligence on his part. *Weed v. Village of Ballston Spa*, 76 N. Y. 329 (1879).

**Evidence.** Declarations of the superintendent, made before the injury, are admissible to show his knowledge of the defect. *Shaw v. Town of Potsdam*, 11 App. Div. 508, 42 N. Y. Supp. 779 (1896). Declarations of the superintendent, made the day after the accident, are inadmissible in an action against the town. *Stone v. Town of Poland*, 58 Hun, 21, 11 N. Y. Supp. 498 (1890). It is error to allow the plaintiff to prove that after the accident guards to the approaches of a bridge and a new abutment and retaining wall were erected by the superintendent, and that he deemed them necessary. *Getty v. Town of Hamlin*, 127 N. Y. 636 (1891). Negligence of a prior superintendent of highways may be shown. *Kelly v. Town of Verona*, 97 App. Div. 488, 90 N. Y. Supp. 89 (1904).

**Consequential damage.** Where work on a highway is done not maliciously or unskillfully, the town is not liable for consequential damages. *Radeliff's Executors v. Mayor of Brooklyn*, 4 N. Y. 195 (1850); *Bellinger v. N. Y. C. Railroad*, 23 N. Y. 42 (1861); *Boughton v. Carter*, 18 Johns. 405 (1820).

**Statement to be presented to supervisor.** The requirement that the state-

ment be presented within six months and that fifteen days elapse thereafter before an action may be maintained, simply imposes a condition which affects the remedy, and is not unconstitutional. *Olmstead v. Town of Pound Ridge*, 71 Hun, 25, 24 N. Y. Supp. 615 (1893); *Reining v. Buffalo*, 102 N. Y. 308 (1886). The Legislature has the right to prescribe, as a condition precedent to bringing the action, that the plaintiff give notice in a certain way to the municipality; but a fair and reasonable construction should be given to the statute so that the right of action of the claimant may be preserved and the municipality have the benefit of the section. *Soper v. Town of Greenwich*, 48 App. Div. 354, 62 N. Y. Supp. 1111 (1900).

A mailing of the notice to the town clerk is a sufficient presentment to the supervisor, where the latter actually received it and acted upon it; and the statute is satisfied by serving a copy of the claim, where the original was duly verified and the copy purports to show such verification. *Soper v. Town of Greenwich*, 48 App. Div. 354, 62 N. Y. Supp. 111 (1900).

The complaint must show that the claim was served upon the supervisor within six months after the accident and that fifteen days elapsed thereafter before the action was commenced; omission to allege these facts is a defect that can be taken advantage of at any stage of the action. *Olmstead v. Town of Pound Ridge*, 71 Hun, 25, 24 N. Y. Supp. 615 (1893).

**Sufficiency of statement.** Where the statement has served the object intended by the statute, viz., to give the town notice of the claim, such statement did not operate to limit proof of the actual extent of the plaintiff's injuries nor the amount of damages she could recover. *Eggleston v. Town of Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279 (1904). The object of the statute plainly is that the town shall have fair and timely notice of the cause of action and of the claim made against it, and time is given after the notice and before the suit is commenced for the town to examine into the claim and decide what to do with reference to it. This notice is not required to have all the formalities of a complaint or of a bill of particulars; its purpose is served by bringing the general nature of the claim to the attention of the town. *Quinn v. Town of Sempronius*, 33 App. Div. 70, 53 N. Y. Supp. 325 (1898); *Spencer v. Town of Sardinia*, 42 App. Div. 472, 59 N. Y. Supp. 412 (1899); *Eggleston v. Town of Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279 (1904).

The Legislature having made the presentment of the statement of the cause of action to the supervisor a prerequisite to the bringing of an action, the court cannot permit any substitute for it; the statute must be strictly complied with; so, where plaintiff's attorney wrote a letter to the supervisor, which was not returned as not being the statement required, and the town officers acted thereon and negotiated for a settlement with plaintiff, the claimant is not relieved from a literal compliance with the statute, nor have the town officers the power to waive the statutory requirement. *Borst v. Town of Sharon*, 24 App. Div. 599, 48 N. Y. Supp. 996 (1898).

As to what constitutes a sufficient statement to the supervisor of the cause of action, see *Spencer v. Town of Sardinia*, 42 App. Div. 472, 59 N. Y. Supp. 412 (1899).

The statement required by this section is to be "of the cause of action." It should state facts showing the occurrence of the accident, the defects in the highway or bridge which caused it, that the com-

missioner of highways was negligent and the plaintiff was free from negligence, and that the plaintiff was injured and was entitled to damages therefor. It might well state the nature and extent of the injuries sustained, and the amount of damages claimed therefor, but the amount of damages would be merely an estimate and the plaintiff would not be restricted to the amount stated. So where a claimant in her statement specifies damages in the sum of \$1,000 for certain injuries therein described, she should not be precluded from proving greater damages because of other and more serious injuries not included in the statement and which developed subsequent to the filing of such statement. *Eggleston v. Town of Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279 (1904).

**Miscellaneous.** The officers of a municipal corporation are vested with authority as town superintendents of highways, in regard to streets within its limits, and as such are agents of the corporation so as to make the latter civilly responsible for their negligence. *Sawell v. City of Cohoes*, 75 N. Y. 45 (1878); *Conrad v. Trustees of Village of Ithaca*, 16 N. Y. 158 (1857); *West v. Trustees of Brockport*, 16 N. Y. 161 (1857); *Wyatt v. Trustees of Rondout*, 44 Barb. 385 (1863); *Todd v. City of Troy*, 61 N. Y. 506 (1875).

Where an act of the Legislature imposes upon two towns the duty of keeping a highway in repair, the towns are jointly and severally liable for an accident resulting from their joint negligence. *Oakley v. Town of Mamaronck*, 39 Hun, 448 (1886); *Shaw v. Town of Potsdam*, 11 App. Div. 508, 42 N. Y. Supp. 779 (1896); *Bryan v. Landon*, 3 Hun, 500 (1875); *Beckwith v. Whalen*, 5 Lans. 376 (1872); *Getty v. Town of Hamlin*, 46 Hun, 1 (1887). Town, compelled to pay damages, may recover from person primarily under obligations to remedy the defect. *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898).

§ 75. **Action by town against superintendent.**— If a judgment shall be recovered against a town for damages to person or property, sustained by reason of any defect in its highway or bridges, existing because of the neglect of any town superintendent, such town superintendent shall be liable to the town for the amount of the judgment, and interest thereon, but such judgment shall not be evidence of the negligence of the superintendent in the action against him.

**Derivation.** This section was derived from former Highway Law, § 17, without change. L. 1881, chap. 700, § 3, from which section 17 of the former Highway Law was derived, was as follows: "If the defect in such highway or bridge shall have been caused by the misconduct or neglect of the commissioner or commissioners of highways of the town in which the same may be situated, then and in such case the town, against which any judgment shall have been recovered by reason of such defective highway or bridge, may bring an action against such delinquent commissioner or commissioners of highways and recover the amount of such judgment." The provision of former section 17 to the effect that "Such judgment shall not be evidence of the negligence of the superintendent in the action against him," was not contained in the Act of 1881.

The negligence of the highway officer in permitting defects to exist, for which, when causing injury, the town may be made liable, has been fully considered in the cases cited in the note to the preceding section. As has been stated in such note the liability of the officer responsible for the defect has been eliminated and that of the town substituted therefor. In thus making the town primarily liable the Legislature saw fit to protect the town against the negligence of the highway officer, by permitting an action by the town against him, where judgment had been recovered against the town for such negligence.

The negligence of the commissioner, although established in the action against the town, must be again proved in the action by the town against the commissioners. Notwithstanding the remedy afforded the town under this section, and the frequency of cases arising where towns have been liable for defects in highways caused by the negligence of commissioners, actions are seldom brought by towns against their commissioners and if brought are usually unsuccessful. *Lane v. Town of Hancock*, 142 N. Y. 510 (1894). See also *Waller v. Town of Hebron*, 5 App. Div. 577, 39 N. Y. Supp. 381 (1896).

Town superintendent since the Act of 1881, chap. 700, and of the Highway Law of 1890, §§ 16, 17, are no longer liable for their negligence to persons injured; the primary liability to such persons is that of the town. *Williams v. Village of Port Chester*, 97 App. Div. 84, 89 N. Y. Supp. 671 (1904). The Highway Law of 1890 continued in force the act of 1881. *Riley v. Town of Eastchester*, 18 App. Div. 94, 45 N. Y. Supp. 448 (1897). The section, as it existed in the former Highway Law, was passed in view of the law as it had been announced by the courts without contemplating any change. *People ex rel. Cole v. Cross*, 87 App. Div. 56, 83 N. Y. Supp. 1083 (1903).

Liability of town superintendent to town is the test of the town's liability. *Mack v. Town of Shawangunk*, 98 App. Div. 577, 90 N. Y. Supp. 760 (1904).

§ 76. Audit of damages without action.— The town board of any town may audit as a town charge, in the same manner as other town charges are audited, any one claim not exceeding five hundred dollars, for damages to person or property, heretofore or hereafter sustained by reason of defective highways or bridges in the town, if in their judgment it be for the interest of the town so to do; but no claim shall be so audited unless it shall have been presented to the supervisor of the town within six months after it accrued, nor if any action thereon shall be barred by the statute of limitations. The town board may also audit any unpaid judgment heretofore or hereafter recovered against a town superintendent for any such damages, if such town board shall be satisfied that he acted in good faith, and the defect causing such damage did not exist because of the negligence or misconduct of the superintendent against whom such judgment shall have been recovered.

**Derivation.** This section is derived from former Highway Law, § 18, without change. Such section was taken from L. 1881, chap. 700, § 4. In the Act of 1881 there was no provision made for the payment of a claim for damages caused by defective highways or bridges prior to the recovery of a judgment.

**Audit of claim** for damages sustained by reason of defective highway or bridges must be made in the same manner as the audit of other claims on account of the highways. For a full consideration of the audit of claims against towns for highway and bridge purposes see note to section 106, *post*. Presentation of a claim for the damages above specified should be made at the meeting of the town board held on the Thursday preceding the annual meeting of the board of supervisors. See Town Law, § 162.

**Judgments** against a town for damages sustained as provided in this section are town charges, but before payment must be presented for audit. If no money is available it is the duty of the board of supervisors to cause a sum sufficient to pay the judgment to be levied on the taxable property of the town. If the judgment exceeds the sum of \$1,000 the town board may borrow a sum necessary to pay it, and cause town bonds to be issued, signed by the supervisor and attested by the town clerk. Town Law, § 180.

The General Municipal Law (L. 1892, chap. 685), § 20, provides: "When a final judgment for a sum of money shall be recovered against a municipal corporation, and the execution thereof shall not be stayed pursuant to law, or the time for such stay shall have expired, the treasurer or other financial officer of such corporation having sufficient moneys in his hands belonging to the corporation not otherwise specifically appropriated, shall pay such judgment upon the production of a certified copy of the docket thereof." This section is not to be construed so as to authorize a supervisor to pay a judgment sustained by reason of defective highways or bridges, without formal audit. The requirement for audit contained in the above section of the Highway Law is absolute.

**Judgments against town superintendent.** No absolute liability is imposed upon towns for all judgments recovered against a town superintendent of highways in actions prosecuted by him in his official name. The board of town auditors have power to determine whether the action was rightfully prosecuted. In determining as to the liability of the town the board acts judicially, and its actions cannot be reviewed or controlled by the courts through a writ of mandamus. *People ex rel. Myers v. Barnes*, 114 N. Y. 317 (1889); *People ex rel. Phoenix v. Supervisors of New York*, 1 Hill, 362 (1841).

**§ 77. Closing highways for repair or construction.**— If it shall appear necessary to a district or county superintendent to close a highway which is being constructed, improved or repaired under this chapter so as to permit a proper completion of such work, he shall execute a certificate and file the same in the office of the town clerk in which such highway is situated. Such certificate shall state the necessity for the closing of such highway and describe the portion thereof to be closed; not more than two miles

of any highway shall be closed at any one time. At the time of filing such certificate such district or county superintendent shall notify the town superintendent to close the highway, who shall thereupon close the same to public travel by erecting suitable obstruction and posting conspicuous notices to the effect that the highway is closed. The town superintendent shall, if practicable, provide a new location for, and construct a temporary highway to be used by the traveling public in lieu of the closed highway and may erect temporary bridges when necessary, or cause other existing highways to be used, when so directed by the district or county superintendent. For the purpose of locating, constructing and erecting such temporary highway or bridge the town superintendent may enter upon the lands adjoining or near to the closed highway and may, with the approval of the town board, agree with the owners of such land as to the damages, if any, caused thereby. If the town superintendent is unable to agree with such owner upon the amount of damages thus sustained the amount thereof shall be ascertained, determined and paid as provided in section fifty-eight. When such highway shall have been closed to the public as provided herein any person who disregards the obstruction and notice, and drives, rides or walks over the portion of the highway so closed, shall be guilty of a misdemeanor.

**Derivation.** This section provides a new method of closing highways which are being constructed or improved. L. 1898, chap. 115 § 11, as amended by L. 1907, chap. 717, provided for the closing of highways which were being constructed or improved under that act, but did not provide for the construction of a temporary highway to be used in lieu of the closed highway. The above section is extended to all highways constructed, improved or repaired under this chapter and provision is made for the location and construction of temporary highways and bridges.

**Certificate of necessity** for the closing of a highway, pending improvements, can only be executed by the county or district superintendent, and must be filed in the office of the town clerk of the town in which the highway is situated. Such certificate may be in the following form:

**FORM No. 28.**

**Certificate for Closing Highway.**

STATE OF NEW YORK, }  
COUNTY OF . } ss.:

This is to certify that the undersigned, county [or district] superintendent, having jurisdiction of the highways of the county of \_\_\_\_\_, does hereby close that portion of the highway in the town of \_\_\_\_\_, in such county, running from the village of \_\_\_\_\_ to the village of \_\_\_\_\_ between \_\_\_\_\_

points thereon described as follows: [describe points in the highway between which the same is to be closed].

That the necessity for such closing consists in the fact that such highway is a State [county or town] highway and is being improved [constructed or repaired] under the provisions of the Highway Law, and that the work of improving [constructing or repairing] such highway cannot be properly conducted and completed unless the portion thereof above described be closed during the time such work is being performed. [If other causes exist making it necessary to close the highway during the progress of the work they should be stated.]

In witness whereof he has on this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,  
set his hand, \_\_\_\_\_ J. D.

*District [or County] Superintendent of Highways.*

## ARTICLE V.

### Highway Moneys; State Aid.

- Section 90. Estimate of expenditures for highways and bridges.  
91. Duties of town board in respect to estimates; levy of taxes.  
92. Additional tax.  
93. Extraordinary repairs of highways and bridges.  
94. Limitations of amounts to be raised.  
95. Submission of propositions at town meetings.  
96. Borrowing money in anticipation of taxes.  
97. Towns may borrow money for bridge and highway purposes.  
98. Issue and sale of town bonds.  
99. Assessment of village property.  
100. Statement by clerk of board of supervisors.  
101. Amount of state aid.  
102. Mileage and assessed valuation.  
103. Payment and distribution of state money.  
104. Custody of highway moneys; undertaking of supervisor.  
105. Expenditures for repair and improvement of highways.  
106. Expenditures for bridges and other highway purposes.  
107. Reports of supervisor as to highway moneys.  
108. Highway accounts; forms and blanks.  
109. Duty of town clerk.  
110. Compensation of supervisor and town clerk.  
111. Additional expenditure for improvement, repair and maintenance of town highways.

§ 90. Estimate of expenditures for highways and bridges.—  
The town superintendent shall annually, on or before the thirty-first day of October, make a written statement in respect to the amount of money which should be raised by tax in the town for the ensuing year, beginning on said first day of November, for the purposes therein set forth, which shall be filed with the town clerk. Such statement shall specify:



1. The amount of money necessary to be levied and collected for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet. Such amount shall not be less than an amount which when added to the amount of money to be received from the state, under the provision of section one hundred and one, will equal thirty dollars for each mile of highways within the town, outside the limits of incorporated villages, except that no town having an assessed valuation of three thousand seven hundred and fifty dollars or less per mile outside of incorporated villages shall be required to levy and collect a tax under this subdivision in excess of four dollars on each thousand dollars of assessed valuation.

2. The amount of money necessary to be levied and collected for the repair and construction of bridges, having a span of five feet or more.

3. The amount of money necessary to be levied and collected for the purchase, repair and custody of stone crushers, steam rollers, traction engines, road machines for grading and scraping, tools and implements.

4. The amount of money necessary to be levied and collected for the removal of obstructions caused by snow and for other miscellaneous purposes.

The amounts specified in such statement shall not exceed the limitations prescribed in section ninety-four. If the town superintendent is of the opinion that an amount in excess of the limitations therein prescribed be raised by tax, he shall include in his statement his reasons therefor in detail.

**Derivation.** Former Highway Law, § 19, required the commissioner of highways to make an annual report to the town board containing an estimate of the probable expense of improvements necessary to be made to highways and bridges during the ensuing year, in addition to the labor to be assessed in the several districts of the town in that year. It was then provided that the board of supervisors should cause the amount so estimated to be raised by tax in the town, provided it did not exceed the sum of \$500; if the amount so estimated exceeded such sum, but was less than \$1,000, the town board was required to approve the estimate whereupon the board of supervisors was directed to raise the amount by tax. These amounts were in excess of the labor to be assessed.

**Time of taking effect.** Under the provisions of section 317, *post*, this section takes effect immediately, that is, on the 19th day of May, 1908. The object of providing for the taking effect of this section at once was to enable the present highway commissioners to make an estimate of expenditures for highways and bridges for the year beginning on the first day of November, 1908, so that money would be available in each town for highway purposes during the ensuing year.

The chairman of the joint committee on highways, Senator Allds, in submitting the present Highway Law, made the following statement in respect to this section: "It is proposed in this bill to abolish the labor system and provide for the improvement and repair of highways and bridges by a money tax. In analogy to the system now in use in labor system towns it is here provided that the town superintendent shall estimate as to the amount required to be raised by tax in the town for the purposes specified. The next section provides for the approval or modification of such estimate and the presenting of the approved or modified estimate to the board of supervisors, whereupon such board is required to levy the tax upon the town in accordance therewith. The amount so to be raised by tax in each town is subject to the limitations imposed in section 94. If such limitations are exceeded it is intended that before a tax is levied there shall be an affirmative vote at a regular or special town meeting."

**Change in method of highway taxation.** One of the objects sought by this law is the abolishing of the old labor system of taxation and substituting in place thereof in all towns the money system of raising highway taxes. This has affected the method of highway taxation in less than three hundred of the nine hundred and thirty-five towns of the State. In other towns the money system is in force when this chapter takes effect. In towns adopting the money system, under the former law, the amount of the tax to be levied and collected in the town was to be determined by the commissioner or commissioners of highways and the town board. See former Highway Law, § 53. The minimum amount to be collected in such towns for the repair of highways was required, by that section, to at least equal one-half the value of the commutation rates, of the highway labor which should be assessable under the labor system. This section of the former law did not, nor does the present law, prescribe the maximum amount which could be raised by tax for the repair and maintenance of highways.

If it became necessary to raise money by tax upon the town for other purposes than the repair and maintenance of highways, authority therefor, either expressed or implied, had to be found in the various more or less conflicting provisions of the former law. The new law seeks to eliminate this confusion by placing the initiative with the town superintendent, making it his duty to present to the town board in a formal statement, the amount, which in his opinion, should be raised in the town during the ensuing year for the purposes specified therein. This statement is in the nature of a highway budget. It becomes effectual and binding upon the town when finally approved by the town board. Upon such approval it is to be submitted to the board of supervisors who thereupon must cause the amounts specified in the statement to be levied and collected in the town in the same manner as other charges against the town are levied and collected. It is thus provided that an amount sufficient to properly administer highway affairs in the town for the ensuing year will be collected and ready for use in the hands of the supervisor. This statement must be submitted on or before the thirty-first day of October, which brings it to the attention of the town board so that the town board may act upon it at its regular meeting on the Thursday preceding the annual meeting of the board of supervisors. The levy is made by the board of supervisors at its annual meeting and when the tax warrant reaches the hands of the collector it provides for the collection of

money sufficient to take care of highway matters during the next year. Such moneys will be paid over to the supervisor, for the most part, in the months of January, February or March, prior to the time when active operations upon the highways are required to be begun.

**Minimum amount for repair and improvement.** It will be noticed under subdivision 1, that the minimum amount which is to be raised by tax in each town for the repair and improvement of highways will vary according to the amount which the town receives from the State under section 101, *post*. Where the assessed valuation is less than that prescribed in this subdivision the amount to be raised by the town for each mile of highways may be less than a sum which, together with the money received from the State, will equal \$30 a mile. It was thus intended to protect the smaller and poorer towns from excessive taxation for highway purposes.

The statement of the town superintendent must be filed with the town clerk, at any time prior to the first day of November; it is the duty of the town clerk to present such statements to the town board at its meeting held on the Thursday succeeding general election day in each year. See section 91, *post*. The statement should be executed by the town superintendent in duplicate, because under section 91, it is required that the estimate as finally approved by the town board shall be in duplicate, one of which is to be filed in the office of the town clerk and the other is to be delivered to the supervisor.

Such statement may be in the following form:

**FORM No. 29.**

**Annual Estimate of Expenditures.**

The undersigned, town superintendent of highways of the town of \_\_\_\_\_, hereby makes the following statement pursuant to section 90 of the Highway Law, in respect to the amount of money which should be raised by tax in such town for the ensuing year, beginning on the first day of November, 19 \_\_\_\_\_, for the purposes herein set forth. There should be levied and collected:

1. For the repair and improvement of town highways, including sluices, culverts and bridges having a span of less than five feet, the sum of \_\_\_\_\_ dollars;

2. For the repair [and construction] of bridges, having a span of more than five feet, the sum of \_\_\_\_\_ dollars.

Such sum is needed for the repair [and construction] of the following bridges: [State specifically purposes for which money is required].

- a. For general repair of Bennettsville bridge..... \$200
- b. For reconstruction of bridge over Sawmill Creek, near village of.... 700
- c. For general repairs of other bridges..... 350

3. For purchase [repair and custody, as case may be] of stone crushers, rollers, traction engines, road machines, tools and implements, the sum of \_\_\_\_\_ dollars. Such sum is needed for the following purposes: [State specifically purpose for which money is required, as for example:

- a. For repairs of roller; new parts to engine, etc..... \$200
- b. For purchase of plows, scrapers and other tools..... 50
- c. For housing roller and road machines..... 65]

4. For the removal of obstructions caused by snow, the sum of  
dollars;

5. For the following miscellaneous purposes, the sum of \_\_\_\_\_ dollars.  
The sum is needed for the following purposes: [State specifically any lawful  
highway purpose for which money may be expended and for which the town  
would be justified in making an expenditure].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19. .

J. D.,

*Town Superintendent of Highways, Town of \_\_\_\_\_*

**Power of superintendent to bind town.** The town superintendent of highways cannot go beyond the statement and estimate of expenditures and incur indebtedness which will be binding upon the town unless authorized as provided by statute. *Robinson v. Town of Fowler*, 80 Hun, 101, 30 N. Y. Supp. 25 (1894); *Lyth & Sens v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900). The town superintendent cannot borrow money for the repair of roads and bridges and in this way contract a debt against the town. *Barker v. Loomis*, 6 Hill, 463 (1844). Nor can he employ an attorney on the credit of the town in proceedings to lay out a highway. *People ex rel. Bevins v. Supervisors*, 82 Hun, 298, 31 N. Y. Supp. 248 (1894).

The former statute made it the commissioner's imperative duty to make a statement of the necessary improvements to be made on bridges and highways in each highway district, and an estimate of the probable expense thereof, to the town board at its second meeting, that is the meeting held on the Thursday prior to the annual meeting of the board of supervisors. A duplicate of such statement and estimate was required to be delivered to the supervisor of the town. The board of supervisors at its next meeting was then required to cause the amount to be assessed upon and collected in the town. *Lament v. Haight*, 44 How. Pr. 1 (1872).

The object of providing for such statement and estimate is to enable the town to raise money for highway purposes by annual taxation rather than by incurring indebtedness or borrowing money. *Wells v. Town of Salina*, 119 N. Y. 280, 290 (1890).

#### § 91. Duties of town board in respect to estimates; levy of taxes.

— The town board, at its meeting held on the Thursday succeeding general election day in each year, shall consider the estimates contained in such statement. It may, by a majority vote of the members thereof, approve such statement, or increase or reduce the amount of any of the estimates contained therein, subject to the limitations prescribed in section ninety-four. The statement, as thus approved, increased or reduced shall be signed in duplicate by a majority of the members of the town board, one of which shall be filed in the office of the town clerk, and the other shall be delivered to the supervisor. The town clerk shall make and transmit a copy of such statement to the commission. The supervisor shall present such statement to the board of super-

visors and such board shall cause the amounts contained therein, subject to the limitation requiring a vote of the electors as hereafter provided, to be assessed, levied and collected in such town in the same manner as other town charges, and such amounts shall be expended for the purposes specified in such statement. The warrant for the collection of taxes in such town shall direct the payment of the money so collected to the supervisor of the town, to be held by him and paid out for the purposes specified in such statement, as provided in this chapter.

**Derivation.** Under the former Highway Law, § 19, the statement of the improvements necessary to be made on highways and bridges in the town was to be presented by the highway commissioner to the supervisor of the town. If the amount estimated for was less than \$500 the supervisor presented the statement to the board of supervisors who were required to assess, levy and collect the amount so estimated upon such town in the same manner as other town charged. If the amount so estimated exceeded \$500, but was less than \$1,000, the statement was to be presented to the town board, and if the same was approved by such board then it was to be presented to the board of supervisors and the amount thereof was required to be assessed, levied and collected.

**Time of taking effect.** This section also takes effect immediately, that is on the 19th day of May, 1908. This was provided so that the levy of taxes for highway purposes might be made by the board of supervisors at their annual meeting in the year 1908.

**Duties of town board in respect to estimates of expenditures.** The town superintendent of highways has not, under the present law, any independent control over the amount of money which shall be raised in the town for the repair and improvement of highways and bridges and for other highway purposes. He is required to prepare an estimate of the necessary amount to be raised for the several purposes, but such estimate does not become effectual until it has been submitted to the town board and approved by it. The town board may, under this section, either approve it as made by the town superintendent, or may increase or reduce the amount of any or of all the items contained therein. The town board will give due consideration to the suggestions and recommendations of the town superintendent, recognizing the fact that the town superintendent, from his position, must be better informed as to highway conditions and necessities. In no event may the amount to be raised for the several purposes specified in such estimate exceed the limitations prescribed by section 94. If an additional amount is required, it can only be raised after a proposition has been submitted and adopted at a biennial or special town meeting (see section 92, *post*), or in case of extraordinary repairs when the town superintendent may, with the approval of the town board, cause them to be made and the expense thereof will be a town charge although not provided for in the estimate (see section 93, *post*).

The question may arise as to whether the town board may modify the statement presented by the town superintendent by striking out any of the estimates contained therein, or by inserting estimates which have been

omitted. The intent of the statute seems to be that the town superintendent is to suggest the various purposes for which money is to be raised, and that the town board can only reduce or increase the amounts asked for. This seems reasonable in view of the responsibility placed upon the town superintendent for the proper condition of town highways and bridges. The responsibility of the town board extends primarily, so far as the estimate is concerned, to the supplying of funds sufficient for the proper maintenance, repair and improvement of town highways and bridges. It is made the positive duty of the town superintendent to include in his estimate sums sufficient for such purposes. If he desires to provide for a certain improvement not thought desirable by the town board, the board may reduce the total amount estimated to be expended for general repairs and improvements under subdivision 1 of section 90, by an amount stated by the superintendent to be required for such improvement. If the town board desires an improvement to be made for which the superintendent has not estimated, the total amount estimated under subdivision 1 of section 90 may be increased, and the board may insist on the particular improvement being made, under the agreement to be entered into by the members of the town board and town superintendent, pursuant to section 105, *post*.

The approval of the town board should be indorsed on the statement of the town superintendent, and signed by the members of the town board. The statement must be prepared and signed in duplicate. If the amounts contained in the statement are reduced or increased, new statements should be made containing the estimates as revised, signed in duplicate by the members of the town board. It is the statement as finally acted upon by the board which becomes the basis for the levy by the board of supervisors.

**Boards of supervisors to levy taxes.** Under this section the supervisor is to present one of the statements, as approved, increased or reduced by the town board, to the board of supervisors whose duty it then is to assess and levy the amount thereof in the same manner as other town charges. It is provided in the County Law, § 12, subd. 3, that the board of supervisors shall "annually direct the raising of such sums in each town as shall be necessary to pay its town charges," and in subdivision 4 of such section it is provided that such board shall "cause to be assessed, levied and collected, such other assessments and taxes as shall be required of them by any law of the state." The board of supervisors in assessing and levying the taxes for highway purposes is subject to the provisions of this law. It cannot exceed the amount estimated for in the statement submitted to it by the several towns of the county except in the cases specified in sections 92 and 93. As far as taxation for the maintenance and repair of town highways and bridges is concerned, the statute intends that the town shall be the unit, and that the town officers shall act without interference on the part of the board of supervisors. The board acts ministerially in assessing and levying the taxes and has no discretion as to the amounts which shall be raised for the specified purposes.

**Collection of taxes and expenditures.** The board of supervisors provides for the preparation of the tax-roll of the town, to which is attached a warrant under the seal of the county, signed by the chairman and the clerk of the board of supervisors, to collect from the persons named in the roll the sums mentioned therein. Tax Law, §§ 55 and 56. Under section 56 of the

**Tax Law** it is provided that the collector's warrant shall direct him to pay "to the commissioners of highways of the town, such sum as shall have been raised for the support of highways and bridges therein." This provision is superseded by the above section which provides that the warrant shall direct the payment of the money so collected to the supervisor of the town.

This section directs that the amounts collected as provided therein shall "be expended for the purposes specified in such statement." Expenditures for the repair and improvement of town highways are provided for in section 105, *post*, and expenditures for bridges and other highway purposes, in section 106, *post*.

**Insufficient appropriations.** Where the appropriation for the ordinary improvement of highways and bridges of a town made under the above section is insufficient, the proper course is for the town superintendent to apply to the town board to procure a vote of a town meeting to make the necessary improvement, under section 92. In the absence of such consent the town superintendent has no power to proceed with the improvements, and apply in payment therefor the appropriation for the succeeding year, and expenditures so made create no legal claim against the town. *People ex rel. Peterson v. Clark*, 45 App. Div. 65, 60 N. Y. Supp. 1045 (1899). The town superintendent of highways cannot of his own volition bind the town for a greater amount than that estimated, levied and collected. *Mather v. Crawford*, 36 Barb. 564 (1862); *Barker v. Loomis*, 6 Hill, 463 (1844).

Burdens assumed by towns in reference to the care of highways, except where expressly imposed by statute, are quite voluntary and can be assumed only through their voluntary consent, given in open town meeting as provided by statute. *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900).

**§ 92. Additional tax.**— Whenever the town superintendent and the town board shall determine that the sum of one thousand dollars will be insufficient to pay the expenses actually necessary for the removal of obstructions caused by snow and the prevention of such obstructions, and whenever they shall determine that the amounts levied and collected for any of the purposes mentioned in the statement presented to the board of supervisors, as provided in the preceding section, are insufficient to pay the expenses necessarily incurred for any of the purposes therein specified they may cause a vote to be taken by ballot at a biennial town meeting or at a special town meeting duly called therefor, authorizing such additional sum to be raised as they may deem necessary for such purpose, not exceeding one-third of one per centum upon the taxable property of the town as shown by the last assessment-roll thereof.

**Derivation.** This section is taken from former Highway Law, § 9, as amended by L. 1906, chap. 423. Such section was as follows: "Whenever

the commissioners of highways and town board shall determine that the sum of \$1,000 will be insufficient to pay the expenses actually necessary for the improvement of highways and bridges, the removal of obstructions caused by snow and the prevention of such obstructions, and the purchase of road machines, tools and implements, they may cause a vote to be taken by ballot at any town meeting authorizing such additional sum to be raised as they may deem necessary for such purpose, not exceeding one-third of one per centum upon the taxable property of the town as shown by the last assessment-roll thereof."

**Object and effect of section.** If the amounts specified in the estimate of expenditures for highways and bridges as made by the superintendent as provided in section 90 and approved and modified by the town board under section 91, are insufficient to meet any of the purposes therein specified, a vote may be taken at a biennial or special town meeting and a sum in addition thereto raised, but which shall not exceed one-third of one per centum upon the taxable property of the town as shown by the last assessment-roll thereof. This additional amount is to be assessed and levied by the board of supervisors upon the town in the same manner as any other town charge. Such additional sum is not to be raised by the issue of bonds but must be by tax, but money may be borrowed in anticipation of the tax so to be levied as provided in section 96, *post*. The amount raised under this section is not subject to the limitations imposed by section 94.

**Removal of obstructions caused by snow.** The town superintendent is authorized to estimate as to the amount necessary for the removal of obstructions caused by snow. See section 90, subdivision 4, *ante*. The amount so estimated is subject to approval or modification by the town board under section 91. The above section limits the amount which may be so estimated for to \$1,000. If a greater amount is needed for such purpose it must be raised after a vote at a town meeting, as provided in this section.

**Effect of failure to secure additional sum.** It is the duty of a town superintendent and town board to take action under this section to secure such sum, in addition to that estimated for in his annual statement, as may be necessary to keep the highways and bridges of the town in a safe condition. This duty is as binding as that of expending available funds for such purpose, so far at least as concerns the liability of the town for injuries caused by defects in highways and bridges; for instance, it has been held that as a defense to an action for injuries sustained by reason of a defective highway, it is not sufficient to show that the superintendent had no funds, but it must also be shown that he had sought through the proper channels to procure them. *Whitlock v. Town of Brighton*, 2 App. Div. 21, 37 N. Y. Supp. 333 (1896), affirmed, 154 N. Y. 781; *Warren v. Clement*, 24 Hun, 472 (1881); *McMahon v. Town of Salem*, 25 App. Div. 1, 49 N. Y. Supp. 310 (1898).

**Exceeding appropriations.** When the superintendent fails to call for and get the vote of a town meeting under the provisions of this section, the town board by its subsequent approval, although somewhat irregular, may ratify in substance, so far as it has power, the acts of the superintendent. *Edwards v. Ford*, 22 App. Div. 277, 47 N. Y. Supp. 995 (1897). But the rule is and always has been that the superintendent cannot pledge the credit of the town for the purpose of repairing bridges or highways, beyond the funds



made available as provided in the Highway Law. *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *Eveleigh v. Town of Hounsfield*, 34 Hun, 140 (1884). A town superintendent is not a general agent of a town and has no authority to make contracts in its behalf unless specifically authorized by statute. *Livingston v. Stafford*, 99 App. Div. 108, 91 N. Y. Supp. 172 (1904). Assumption of obligations contracted by a town superintendent, outside of those imposed by statute, is purely voluntary on the part of the town. *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883).

Statutes authorizing highway officers to apply at town meeting to raise additional amount for highways reviewed. *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477 (1892); *Hill v. Board of Supervisors of Livingston*, 12 N. Y. 52 (1854).

**Submission of proposition at town meeting.** A special town meeting may be called upon the application of a supervisor or town superintendent of highways to determine questions pertaining to their respective duties as such officers, and which the electors of a town have a right to determine. Town Law, § 23. The above section of the Highway Law should be construed in connection with such section of the Town Law so as to authorize an application for a special town meeting by the town superintendent and town board, acting together. Such application should be addressed to the town clerk and may be in the following form:

**FORM No. 30.**

**Application for Special Town Meeting.**

To John D., Town Clerk of the Town of \_\_\_\_\_, county of \_\_\_\_\_ :

The undersigned, town superintendent of highways and members of the town board of the town of \_\_\_\_\_, hereby apply to, and require of you that you call a special town meeting of the qualified voters of such town in the manner provided by law, for the purpose of voting upon the following proposition:

*Resolved*, That there be raised by tax in the town of \_\_\_\_\_, in the year 19\_\_\_\_, the sum of : \_\_\_\_\_, for the repairs and improvement of highways [or state other purpose for which the additional sum is required] in addition to the sum estimated for such purpose in the statement presented to the board of supervisors of the county of \_\_\_\_\_, by the town board of such town, as provided by section 91 of the Highway Law, and that such additional sum be levied and collected in such town in the same manner as amounts are levied and collected for other highway and bridge purposes.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of town superintendent of highways and members of town board.]

The town clerk is required, at least ten days before the holding of a special town meeting, to "cause notice thereof under his hand to be posted conspicuously in at least four of the most public places of the town; which notices shall specify the time, place and purpose of the meeting." Town Law, § 24. The following form of notice may be used:

## FORM No. 31.

## Notice of Special Town Meeting.

Notice is hereby given that, pursuant to an application made therefor as provided by statute, by the town superintendent of highways and town board of the town of \_\_\_\_\_, a special town meeting of the qualified voters of such town will be held at \_\_\_\_\_, in the village of \_\_\_\_\_, on the day of \_\_\_\_\_, 19\_\_\_\_, for the purpose of voting by ballot, as provided in section 92 of the Highway Law, upon the following proposition: [Here state proposition as contained in the application for the special town meeting], and for the transaction of such other business as may be properly brought before such meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

JOHN D.,

Town Clerk, Town of \_\_\_\_\_.

All votes at town meetings upon any proposition to raise or appropriate money or incur any town liability exceeding \$500, shall be by ballot; if \$500 or less, the vote may be *viva voce*, unless a ballot is required by law authorizing the expenditure. An elector of a town shall not be entitled to vote by ballot upon any proposition for the raising or appropriation of money or the incurring of any town liability unless he or his wife is the owner of property in the town, assessed upon the last preceding assessment-roll thereof. Town Law, § 33, as amended by L. 1901, chap. 598. Votes upon propositions submitted under section 92 of the Highway Law must be by ballot regardless of the amount to be raised.

The town superintendent and town board must file with the town clerk a written application plainly stating the question they desire to have voted upon and requesting a vote thereon at the town meeting specified therein. Town Law, § 32. This section of the Town Law also provides that "when town officers as such make the application for a vote to raise money for purposes pertaining to their duties, they shall file with their application a statement of their account to date, with the fact and circumstances which, in their opinion, make the appropriation applied for necessary, and their estimate of the sum necessary for the purposes stated, which statement may be examined by any elector of the town and shall be publicly read by the town clerk at the meeting when and where the vote is taken at the request of any elector." Since the present law does not authorize the town superintendent to receive and expend highway moneys, it would probably not be necessary for him to render a statement of his account to date, as required in section 32 of the Town Law. In construing such section with the above section of the Highway Law it will be a sufficient compliance with the requirement for the supervisor to make a statement showing the amount of highway moneys received by him and expended upon the order of the town superintendent. A statement should also be prepared and signed by the town superintendent and members of the town board showing the facts and circumstances which, in their opinion, renders the appropriation applied for necessary and stating in detail the estimate of the amounts required for specific purposes.

Section 32 of the Town Law also provides that "the town clerk shall, at

the expense of his town, give at least ten days' notice, posted conspicuously in at least four of the most public places in the town, of any such proposed question, and that a vote will be taken by ballot at the town meeting mentioned. He shall also, at the expense of his town, provide a ballot box labeled, briefly indicating the question to be voted upon, into which all ballots voted upon the question indicated shall be deposited. He shall also prepare and have at the town meeting a sufficient number of written or printed ballots, both for and against the question to be voted upon, for the use of the electors. The vote shall be canvassed, the result determined and entered upon the minutes of the meeting, the same as votes given for town officers."

The form of ballot to be used for such propositions is prescribed by section 82 of the Election Law. It is therein provided that "ballots for the submission of town propositions and questions to be submitted at town meetings shall be printed in the manner provided by this section, but shall be indorsed 'town proposition submitted.' All ballots for the submission of town propositions for raising or appropriating money for town purposes, or for incurring a town liability, to be voted for at any town meeting in any town shall be separate from the other ballots for the submission of other propositions or questions to the electors of such town to be voted at the same town meeting or election. Such ballots shall be in the form prescribed in this section and shall be indorsed 'propositions for town appropriations.'"

**Women qualified to vote.** A woman who possesses the qualifications to vote for town officers except the qualification of sex, and who is the owner of property in the town assessed upon the last preceding assessment-roll thereof is entitled to vote upon a proposition to raise money by tax or assessment. Town Law, § 44.

The following forms are required in addition to those above prescribed in duly submitting a proposition under this section of the Highway Law:

#### FORM No. 32.

##### Application for Submission of Proposition.

[Required by Town Law, § 32.]

To John D., Town Clerk, Town of \_\_\_\_\_ :

The undersigned, town superintendent of highways and members of the town board of the town of \_\_\_\_\_, hereby make application, pursuant to section 32 of the Town Law, for the submission of a proposition to be voted upon by ballot by the qualified voters of such town, as provided in section 92 of the Highway Law, at the biennial town meeting [or at a special town meeting duly called therefor], to be held in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, for the following purpose and in the following form:

[Here state the proposition desired to be voted upon, i. e., proposition contained in Form No. 30.]

And such applicants hereby request that a vote be taken upon such proposition at such town meeting.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of town superintendent of highways and members of town board.]

## FORM No. 33.

## Notice of Submission of Proposition.

[Required by Town Law, § 32.]

Notice is hereby given that, pursuant to an application therefor, made as prescribed by section 32 of the Town Law, filed in the office of the town clerk of the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the following proposition will be submitted to be voted upon by ballot by the qualified voters of such town at the biennial town meeting [or at a special town meeting duly called therefor], to be held in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, to-wit. [State proposition.]

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

JOHN D.,

*Town Clerk, Town of \_\_\_\_\_.*

§ 93. **Extraordinary repairs of highways and bridges.**— If any highway or bridge shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe for public use and travel, or if any bridge be condemned by the commission, as provided in this chapter, the town superintendent shall cause the same to be immediately repaired or rebuilt, with the approval of the town board. Such highway or bridge shall be so repaired or rebuilt in accordance with the directions or the plans and specifications prepared or approved by the district or county superintendent; except if the bridge to be repaired or rebuilt is one which has been condemned by the commission, as provided in this chapter, the same shall be repaired or rebuilt in accordance with plans and specifications to be prepared or approved by the commission. If the expense of repairing or rebuilding a bridge hereunder shall exceed five hundred dollars, it shall be done under a written contract therefor, which must be approved by the town board. The town clerk shall prepare a statement showing the probable cost of improving, repairing or rebuilding such highway or bridge, which statement shall be signed in duplicate by a majority of the members of the town board, one of which duplicates shall be filed with the town clerk and one be delivered to the supervisor. The town clerk shall make a copy of such statement and transmit the same to the commission. The supervisor shall present such statement to the board of supervisors, who shall cause the amount contained in such statement to be assessed, levied and collected in the same manner as amounts levied and collected for other highway and bridge purposes, as provided by

**law.** The amount so raised shall be paid to the supervisor to be expended for the purposes specified in such statement.

**Derivation.** This section is derived from former Highway Law, § 10, as amended by L. 1905, chap. 417, which read as follows: "If any highway or bridge shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe, the commissioner of highways of the town in which such highway or bridge may be, may cause the same to be immediately repaired or rebuilt, if consented to by the town board, but if the expense thereof exceed \$500, it shall be done under a written contract therefor which must be approved by the town board and the commissioners of highways shall present the proper vouchers for the expense thereof to the town board, at their next annual meeting, and the same shall be audited by them and collected in the same manner as amounts voted at town meetings, and if the expense thereof exceed \$1,500 it shall be done only after such expense shall have been duly authorized by vote at town meeting."

**Object and effect of section.** This section materially modifies the former law. The provision that if a bridge be condemned by the commission it shall be repaired or rebuilt in the same manner as though it were damaged or destroyed by the elements or otherwise is new. The commission is authorized for highways and bridges to be repaired or rebuilt are to be either prepared or approved by the district or county superintendent; if it be a bridge condemned by the commission, the commission itself is authorized to determine as to the plans and specifications. The former law limited the amount to be expended without a vote at a town meeting to \$1,500. This limitation is continued in section 94, *post*.

An estimate is to be made of the probable expense of the repair or reconstruction. Such estimate is to be signed by a majority of the town board in duplicate, one of which is to be presented to the board of supervisors, whereupon such board levies the amount required. In the meantime the work of repairing and rebuilding may be carried on and the expense may be paid after audit by the town board, as provided in section 106, from money borrowed in anticipation of the taxes to be levied by the board of supervisors. The amount when collected is to be paid to the supervisor to be expended by him in payment of such expenses or in repayment of money borrowed in anticipation of the collection of the tax.

If the amount required to make such extraordinary repairs exceeds the limitation of \$1,500 prescribed in section 94, *post*, it will be necessary to submit a proposition at a town meeting as provided in that section; if the required amount is greater than should be paid in any one year there may be submitted at the same town meeting a proposition for the issue and sale of bonds to pay the expenses incurred, under section 97, *post*.

**Duty of district or county superintendent.** Where a highway or bridge has been damaged or destroyed by the elements or otherwise, or has become unsafe for public use and travel, the town superintendent should communicate with the district or county superintendent and inform him as to the condition of a highway or bridge, and as to the necessity of immediately repairing or rebuilding the same. This section provides that such highway or bridge shall be repaired or rebuilt in accordance with the directions or the plans

and specifications prepared by the district or county superintendent. Under section 33, subdivisions 1 and 2, *ante*, p. 24, the district or county superintendent is given the general supervision of repairing, constructing and improving bridges and town highways, and he is required to direct the town superintendent how best to repair, maintain and improve the same. Upon being notified of the condition of the highway or bridge it will then be the duty of the county or district superintendent to direct as to the manner of performing the work and if necessary he may cause plans and specifications to be prepared. He should advise with the town officers as to the probable expense of the repair or reconstruction, since it is necessary for the town clerk to prepare a statement showing the probable cost of the work.

The statement prepared by the town clerk should be based upon information presented to the town board by the town superintendent and by the district or county superintendent. It should state the amount, which in the opinion of the town board, should be raised by tax in the town for the payment of the cost. Such statement is made the basis of the levy of the tax, and in accordance therewith the board of supervisors is to raise the money necessary for the completion of the work. Such statement must be copied by the town clerk and be transmitted to the commission.

**State aid on account of extraordinary repairs.** If a highway is damaged or destroyed by the elements or has become unsafe for public travel, and the same is repaired by the town superintendent with the consent of the town board under the provisions of the above section, and the amount so expended is raised by tax upon the town as required in such section, then the town will be entitled to receive from the State an amount based upon the amount so expended in the same manner as though the expenditure had been made for ordinary highway repair and improvement. See section 101, *post*. The amount expended under this section for the repair or rebuilding of a bridge is not to be made a basis for the receipt of State aid by the town.

**Audit of claims.** Claims arising from the making of extraordinary repairs to highways and bridges can only be paid after audit by the town board as provided in section 106.

**Duty to make extraordinary repairs.** This section, like old section 10 of the former law, is designed to provide for an emergency which could not be provided for in the ordinary way. Where by some unforeseen contingency, "by the elements or otherwise," a highway or bridge becomes unsafe "for public use and travel," it is the positive duty of the town superintendent to take action under this section to make the necessary repairs. The section has been construed so as to authorize the erection of a new bridge in the place of one damaged or destroyed, subject, of course, to the limitations prescribed by section 94, subdivision 4. *People ex rel. Groton Co. v. Town Board*, 92 Hun, 588, 36 N. Y. Supp. 1062 (1895); *Hall v. Town of Oyster Bay*, 61 App. Div. 508, 70 N. Y. Supp. 710 (1901). It will be no answer to the omission on the part of the superintendent to perform this duty, that the town auditors might have withheld their consent for that would have been a violation of their official duties if the safety of the public required the bridge to be repaired; for although the language relative to their consent is permissible, it is in legal effect preemptory in its nature. *Lament v. Haight*, 44 How. Pr. 1 (1872).

The section only applies to an emergency created by the destruction of a bridge shortly after the holding of a town meeting, and is designed to avoid the delay and inconvenience which would result from waiting until the next town meeting for a vote, and the levying and collecting of a tax. It does not apply when one or more town meetings have been held since the destruction of the bridge. The town board may, in its discretion, withhold its consent to the construction of a bridge, and a writ of mandamus cannot be issued to compel the town board to take action. *People ex rel. Fellows v. Early*, 106 App. Div. 269, 94 N. Y. Supp. 640 (1905); but compare *Whitlock v. Town of Brighton*, 2 App. Div. 21, 37 N. Y. Supp. 333, affirmed 154 N. Y. 781 (1896).

An unsafe condition which is the result of ordinary wear and tear is not such an emergency as will warrant action under this section. Such a condition may be remedied in the ordinary manner, by including the amount required in the annual statement as provided in sections 90 and 91. The repairs provided for in section 93 are those arising only from emergencies which could not have been foreseen. This section does not authorize the town superintendent, upon determining that a highway bridge has become unsafe from natural wear and decay, to make a contract for the rebuilding of such bridge, with the approval of the town board, at a cost exceeding the moneys appropriated for highway purposes. The phrase, "or become unsafe," means an unsafe condition arising from an extraordinary cause. *Livingston v. Stafford*, 99 App. Div. 108, 91 N. Y. Supp. 172 (1904).

The commissioners of highways [town superintendents] and town board of a town cannot contract for the building of new bridges in the place of old bridges not damaged except by natural wear, unless the electors of a town duly authorize the raising of money for such purpose. A contractor is charged with the knowledge of the want of such authority. *People ex rel. United Construction Co. v. Voorhies*, 114 App. Div. 351, 99 N. Y. Supp. 918 (1906), affirmed 186 N. Y. (1906).

Consent or approval of the town board. The cases arising under the former law, which are equally applicable under the present law, are all to the effect that the consent or approval of the town board is a prerequisite to the reconstruction or repair of a highway or bridge damaged or destroyed by the elements or otherwise, or which has become unsafe for public use and travel. Without such consent or approval the town superintendent has no authority whatever to contract for the town or incur a town indebtedness for such purpose. With it, he may contract for the rebuilding of a bridge or the repair of a highway, and such contract is binding upon the town. *People ex rel. Groton Bridge Co. v. Town Board*, 92 Hun, 585, 36 N. Y. Supp. 1062 (1895). In the absence of consent of town board, the superintendent has no power to proceed with the improvements, and apply in payment therefor the appropriation for the succeeding year; and expenditures so made create no legal claim against the town. *People ex rel. Peterson v. Clark*, 45 App. Div. 65, 60 N. Y. Supp. 1045 (1899).

Where the commissioner of highways [superintendent] of a town, without the previous consent of the town board, has expended moneys in excess of the amount in his hands, for the purpose of repairing highways which were in a dangerous and unsafe condition, a writ of mandamus will not issue commanding the officers of the town to convene as a town board, and give

their consent to the payment of the highway commissioner's claim for reimbursement. The fact that if an application had been made to the town board prior to the expenditure of the money, they would undoubtedly have consented to the making of the repairs, does not justify the issuance of a mandamus. The consent mentioned in the statute is a judicial act contemplating a decision of the board upon evidence as to whether or not the highways are in such condition as to require immediate repair. *People ex rel. Graham v. Studwell*, 91 App. Div. 469, 86 N. Y. Supp. 967 (1904), affirmed 179 N. Y. 520 (1904). The town board may make the judgment of the superintendent the measure of its consent as to reconstruction of a bridge; and it is not in the province of a writ of mandamus to review the exercise of a judicial or discretionary power of such board, or to direct what the result of its exercise shall be. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894).

If extraordinary repairs become necessary, and the funds supplied are insufficient for the purpose, the law provides the method of procedure to be taken by the town superintendent, with the consent of the town board, whereby a legal obligation to pay for the necessary expenditure may be created directly against the town itself. In no other way may the superintendent create an obligation or liability against the town. *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900); *People ex rel. Bowles v. Burrell*, 14 Misc. 217, 35 N. Y. Supp. 608 (1895). The town board may consent in advance of the making repairs, to the expenditure of a certain amount on certain highways by the superintendent. *Brunner v. Lewis*, 4 N. Y. Supp. 403, 22 N. Y. St. Rep. 93 (1889).

**Form and effect of consent.** No particular form of consent by the town board is required; and where it formally resolves that an unsafe bridge be replaced by a new one, the superintendent has sufficient authority to contract for the bridge, although the board subsequently attempts to delay action that it may obtain legal advice in the matter. *Basselin v. Pate*, 30 Misc. 368, 69 N. Y. Supp. 653 (1900). Where it does not appear whether the consent was in writing or not, it will be presumed, if that be a requisite, that a record of the consent was properly made. *Boots v. Washburn*, 79 N. Y. 207 (1879).

The question as to whether the consent expressed in a resolution of the town board is broad enough to authorize the superintendent to proceed in the manner he did, is one of construction for the court, and not one for the judgment of the board when the claim is presented for audit. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894). In this case the consent provided that "the commissioner of highways of the town of Greece is hereby authorized to repair the bridges that may have gone down since the annual town meeting to the best of his judgment," and it was held sufficient to authorize the commissioner to remodel or reconstruct a bridge if in his judgment it was deemed best or necessary so to do. See also *Hall v. Town of Oyster Bay*, 61 App. Div. 508, 70 N. Y. Supp. 710 (1901).

In the case of *Town of Saranac v. Groton Bridge Co.*, 55 App. Div. 134, 67 N. Y. Supp. 118 (1900) a town board passed a resolution allowing the commissioner of highways to rebuild a bridge destroyed by a flood, provided he can do so by subscription for the necessary labor, and after subscriptions amounting to 180 days' labor had been obtained, the town board passed the



following resolution: "Resolved, that we, as a town board, hereby consent that the commissioner of highways build the bridge known as the Wilcox bridge at Rexford, provided that the same contributions can be secured as has heretofore been offered," and it was held that the highway commissioner had no power to enter into a contract for the construction of an iron bridge for the contract price of \$4,000, to be paid in cash or town certificates, providing that "the subscriptions of labor, subscribed heretofore, will be used in hauling and erecting the work." But in the case of *People ex rel. Groton Bridge Co. v. Town Board*, 92 Hun, 585, 36 N. Y. Supp. 1062 (1895), it was held that the duties of the board so far as the construction of the bridge is concerned end when such consent is once given; they cannot in their resolution direct the course of the commissioner in constructing the bridge, and limitations in that direction contained therein are mere surplusage. This question has been disposed of to an extent by the insertion of the requirement that "if the expense of repairing or rebuilding a bridge hereunder shall exceed \$500, it shall be done under a written contract therefor, which must be approved by the town board." This provision makes it necessary to secure the consent of the town board where a bridge is to be constructed or repaired at an expense exceeding such sum of \$500. The town board may, in its resolution consenting to an extraordinary repair of a highway, require the work to be done under contract, if the cost of the work will exceed \$500. See section 48, *ante*, p. 61.

**Authority to contract for extraordinary repairs.** A town superintendent of highways is not an agent of the town with authority to contract for it in real or supposed emergencies, and cannot make a contract binding upon the town unless specifically authorized by statute. Where a superintendent with the consent of the town board enters into a written contract for the rebuilding of a bridge at a cost exceeding \$500, the superintendent cannot of his own accord enter into an independent contract for the supervision of the work, without the consent of the town board, although the amount involved is less than \$500. The town in such a case is not bound whatever the amount, unless the town board has consented to the contract. *People ex rel. Morey v. Town Board*, 175 N. Y. 394 (1903), reversing 80 App. Div. 280, 80 N. Y. Supp. 309. If extraordinary repairs become necessary, and the funds supplied are insufficient for the purpose, the law provides the method of procedure to be taken by the superintendent, with the consent of the town board, whereby a legal obligation to pay for the necessary expenditure may be created directly against the town itself. In no other way may the commissioners create an obligation or liability against the town. *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900).

A contract made by the superintendent with the consent of the town board is deemed to be the contract of the town and should be made in the name of the town. *Town of Saranac v. Groton Bridge Co.*, 55 App. Div. 134, 67 N. Y. Supp. 118 (1900). In the absence of fraud, the contract may not be attacked as incomplete by being insufficient in form. *Basselin v. Pate*, 30 Misc. 368, 69 N. Y. Supp. 653 (1900). Assumption of obligations contracted by the superintendent, outside of those imposed by statute, is purely voluntary on the part of the town. *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883).

A town superintendent has no authority to create a liability upon the part of his town to a person hired to cut brush along a town highway, and even if such liability were created it would not become actionable until the claim had been acted upon by the town auditors. *Wright v. Town of Wilmurt* 44 Misc. 456, 90 N. Y. Supp. 90 (1904).

§ 94. **Limitations of amounts to be raised.**—The amounts to be raised by tax upon the vote of a town board, as provided in this article, shall be subject to the following limitations:

1. The amount to be levied and collected in each year for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet, shall not be less than the amount prescribed under subdivision one of section ninety.

2. Not more than fifteen hundred dollars shall be levied and collected in any one year in any town for the repair and construction of a bridge unless duly authorized by vote of a town meeting.

3. Not more than five hundred dollars shall be levied and collected in any one year in any town for the purchase or repair of stone crushers, steam rollers, traction engines or road machines for grading and scraping, tools and implements, unless duly authorized by the vote of a town meeting.

4. Not more than fifteen hundred dollars shall be levied and collected in any one year in any town for the repair or construction of any highway or bridge which has been damaged or destroyed as provided in section ninety-three or which has been condemned by the commission as provided in this chapter, unless duly authorized by vote of a town meeting.

**Derivation.** The limitation contained in former Highway Law, § 10, as amended by L. 1905, chap. 417, is retained in subdivision 4 of this section. Subdivision 1 provides a minimum limitation of the amount to be raised in towns for ordinary highway purposes. This minimum is the same as that prescribed in subdivision 1 of section 90, to the effect that an amount must be raised in the town sufficient to provide an available fund for the repair and improvement of town highways equal to \$30 for each mile of highways within the town, provided, however, that the minimum is not required to be so great that a town would be required to raise more than \$4 on each \$1,000 of assessed valuation. Under former Highway Law, § 53, as amended by L. 1907, chap. 716, towns receiving State aid were required to raise an amount "which shall be equal to at least one-half the valuation, at the commutation rate of the highway labor, which should be assessable under the labor system." The limitations imposed by subdivisions 2 and 3 of this section are new.

**Time of taking effect.** The limitations hereby imposed upon the power of town boards to raise money for highways and bridges are in effect May 19, 1908, and on and after that date town boards and town superintendents are subject to its provisions in raising money for highway and bridge purposes. See subdivision 1 of section 317, *post*.

**Limit of amount to be raised for bridges.** If more than \$1,500 is required to be raised in any one year for the repair or construction of a single bridge, it must be after a vote at a town meeting. Under the former Highway Law, § 10, as amended by L. 1905, chap. 417, a bridge which had become unsafe or had been destroyed by the elements could not be repaired or constructed if the amount required would exceed \$1,500, unless the expense had been duly authorized by a vote at a town meeting. It has been thought best in this law to make the limitation the same in regard to the repair or construction of a bridge ordinarily as was required under the former law when extraordinary repairs were necessary.

**Road machinery.** The town superintendent may, with the approval of the town board, purchase stone crushers, steam or other power rollers, traction engines, road machines, etc., under section 49, *ante*. It is here provided that not more than \$500 shall be levied and collected in any one year for any of these purposes unless a vote be had at a town meeting. Under former Highway Law, § 7, stone crushers and power rollers could only be purchased after a submission of a proposition at a town meeting.

**Debts in excess of limitation.** As has already been stated under section 93, *ante*, a town superintendent has no general authority to bind the town by his contracts. He must find his authority in the statute, and those who deal with him, and with the other officers of the town are presumed to know this limitation of power. See *People ex rel. Everett v. Supervisors*, 93 N. Y. 397 (1883); *Berlin Bridge Co. v. Wagner*, 57 Hun, 346, 10 N. Y. Supp. 840 (1890). If he and the town board attempt to raise by tax more money than the limit prescribed by this section, the levy would be invalid, and the collection of the tax might be legally prevented.

§ 95. **Submission of propositions at town meetings.**—A proposition to authorize the levy and collection of an amount greater than that specified in the preceding section for any of the purposes therein mentioned may be submitted upon the written application of twenty-five taxpayers upon the last town assessment-roll or by a majority of the members of the town board, at a biennial town meeting or a special town meeting duly called as provided by law. The provisions of the town law relating to the submission of town propositions at a biennial or special town meeting shall apply to the submission of such propositions. If such proposition be adopted the town board shall include in the estimates contained in the next statement submitted by it to the board of supervisors, as provided in section ninety-one, the amounts authorized to be raised by such proposition for the purposes therein stated, and

thereupon such amounts shall be levied and collected, and paid to the supervisor, to be expended by him as directed by such proposition.

**Derivation.** This section is new in form.

**Time of taking effect.** The provisions of this section take effect May 19, 1908, in accordance with subdivision 1 of section 317, *post*. Propositions for raising money for any highway or bridge purpose, in excess of the limitations prescribed in section 94, must be submitted at a special or regular town meeting, as provided in this section, on and after such date.

**Construction.** This section should be construed in connection with section 94, which makes it necessary to submit propositions requiring the expenditure of sums in excess of the amounts therein specified to a vote of a town meeting.

The provisions of the Town Law, relative to the submission of town propositions at a biennial or special town meeting have been referred to in the note to section 92. The forms contained in such note relating to the application for a special town meeting, for the submission of a proposition at a regular or special town meeting and notices of such meeting and of the submission of such a proposition, may be adapted to the requirements of this section.

**Adoption of proposition.** Owing to the fact that the amount voted at a town meeting is to be included in the estimates contained in the next statement submitted to the board of supervisors, it will happen that the money needed for the purposes for which the proposition was adopted will not be available until after the next town tax is levied and collected. This inconvenience may be in part remedied by taking advantage of the provisions of the next section, relating to the borrowing of money in anticipation of taxes.

**Including amount voted in estimate.** If a proposition is submitted to a town meeting and adopted as provided in this section, the town board must include the amount appropriated by the proposition in the statement made by it to the board of supervisors as provided in section 91. It may be added to the statement as a separate paragraph. The object of including this information is to enable the board of supervisors to raise the required amount by the levy of a tax upon the town.

#### FORM No. 34.

##### Statement as to Amount Voted.

[This paragraph should be appended to the final statement executed by the town board.]

At a regular [or special town meeting] of the electors of such town, held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, a proposition was adopted authorizing the levy and collection of the sum of \$ \_\_\_\_\_ for the [state purpose for which amount is to be expended], a certified copy of which proposition and of the vote thereupon is hereto annexed.

§ 96. **Borrowing money in anticipation of taxes.** — The supervisor may, when authorized by the town board, borrow money in anticipation of taxes to be levied and collected, on the credit of

the town, and issue certificates of indebtedness therefor in the following cases:

1. When an additional sum is directed to be levied and collected by a vote of a town meeting as provided in section ninety-two.

2. When an amount necessary for the payment of expenses incurred in the improvement, repair and rebuilding of a highway or bridge has been directed to be levied and collected as provided in section ninety-three.

3. When a proposition has been adopted at a town meeting as provided in section ninety-five authorizing the levy and collection of an amount greater than that specified in section ninety-four for any of the purposes therein mentioned.

Such certificates of indebtedness shall be signed by the supervisor and the town clerk and shall bear interest at a rate not exceeding six per centum for a period not exceeding one year. The amount so borrowed shall be paid out by the supervisor for the purposes for which the taxes, in anticipation of which such certificates were issued, is\* to be levied and collected. The principal and interest of such certificates shall be paid by the supervisor immediately upon the collection of the taxes levied for such purposes.

**Derivation.** Former Highway Law, § 11, authorizes the issue of certificates of indebtedness for amounts to be paid for work done and materials furnished in the repair of highways and bridges damaged or destroyed by the elements or otherwise. Section 93 of this chapter is a substitute for former section 10, and under subdivision 2 of the above section the amount to be raised under such section 93 may be borrowed in anticipation of the taxes directed to be levied and collected, as provided therein. Except in this respect the above section is new.

**Certificates of indebtedness.** Under section 11 of the former Highway Law certificates were issued, subscribed by the supervisor and town clerk, for the amount audited and allowed to those persons who perform labor or furnish material for the repair of any highway or bridge damaged or destroyed by the elements or otherwise. These certificates bore interest from the date of their issue. It was necessary to issue a number of such certificates in each case where extraordinary repairs were undertaken, which resulted in complication and confusion, and required a considerable amount of bookkeeping. Under the present law the supervisor is authorized, with the consent of the town board, to borrow at a bank or in any other way a sum equal to the taxes to be levied and collected on account of the work to be performed, and payments are to be made direct to the persons entitled thereto out of the moneys so borrowed in the manner provided by section 106. These certificates are to bear interest at a rate not exceeding six per centum and can only

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\* So in original.

run for a period of one year or less. This period will be sufficient to permit of their payment from the taxes collected in the following year in anticipation of which such certificates were issued.

Such certificates may be issued in any of the cases mentioned in this section. They may be issued whenever it has been found necessary to provide for expenditures not included in the annual estimate.

The consent of the town board is required before the supervisors may negotiate a loan and issue certificates of indebtedness therefor. This consent should be given in writing, by resolution adopted by a majority vote of the members of the board.

#### FORM No. 35.

##### Consent of Town Board.

*Whereas* a proposition was duly submitted and adopted at a regular [or special] town meeting of the electors of the town of \_\_\_\_\_, held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, authorizing the levy and collection of a tax upon the taxable property in such town for the sum of \$ \_\_\_\_\_ for the purpose of [state purpose for which the tax is to be collected] as provided in section 95 of the Highway Law. Now, therefore be it

*Resolved*, that we, the undersigned members of the town board of such town, do hereby authorize \_\_\_\_\_, supervisor of such town, to borrow money on the faith and credit of such town, in anticipation of the tax to be levied and collected for the purposes specified in such proposition and to issue certificates of indebtedness of such town, to bear interest at a rate not exceeding six per centum, and to be paid by such supervisor immediately upon the collection of the taxes levied for such purposes.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of members of town board.]

[This form should be modified to conform to the requirements of section 92, in case a proposition is adopted for the raising of a sum in addition to the amounts estimated for as provided in section 91; or to meet the requirements of section 93 in case provision be made as provided therein for the repair or rebuilding of a highway or bridge damaged or destroyed by the elements or otherwise.]

**§ 97. Towns may borrow money for bridge and highway purposes.**— A proposition may be submitted at a regular or special town meeting in the manner provided by the town law, authorizing the town to borrow money upon its bonds, or other obligations, to be expended for the following purposes:

1. Constructing, building, repairing or discontinuing any highway or bridge therein, or upon its borders.
2. Repairing or rebuilding any highway or bridge which shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe for public use and travel.
3. Repairing or rebuilding any bridge which has been condemned by the commission, as provided in this chapter.

4. The purchase of stone crushers, steam rollers and traction engines.

The vote upon any such proposition shall be by ballot. If any such proposition shall be adopted, the board of supervisors, upon the application of the town board, shall by resolution authorize the town to issue bonds not exceeding the amount specified in said proposition, which shall be sufficient to refund and pay any temporary loan or certificate of indebtedness, and to provide for the completion of any work authorized. There shall accompany such application a statement signed by a majority of the members of the town board, and certified by the town clerk, containing a copy of the proposition submitted, as above provided, the vote for and against the same, and specifying the amount which it is estimated will be required to be expended, pursuant to such proposition. If the highway or bridge, proposed to be constructed, built, repaired or discontinued, is situated in two or more towns in the same county, the board of supervisors shall, if application be made by each of such towns, apportion the expense thereof among such towns, in such proportion as it shall deem to be just. If the town adopting any such proposition shall contain any portion of the land of the forest reserve, the board of supervisors shall not authorize such town to borrow moneys without the written approval of the forest, fish and game commissioner, except in payment of a debt lawfully incurred by the town.

**Derivation.** This section is taken from County Law, § 69, as amended by L. 1903, chap. 469. Such section 69 of the County Law is not repealed by this act, but the provisions thereof relating to the borrowing of money by the town after the submission of a proposition at a regular or special town meeting and upon authorization by the board of supervisors, have been superseded by the above section. Under section 69 of the County Law the board of supervisors might authorize a town "to construct, build, repair or discontinue such highway or bridge and to authorize said town or towns to borrow such sums of money therefor, for and on the credit of such town or towns as may be necessary according to a written estimate in items of the fair cost and expense thereof. Said board may also on the applications of any town or towns, authorize them to borrow such sums of money, for or on the credit of such town or towns, as may be necessary to pay any debt lawfully incurred by or on behalf of such town or towns." It will therefore be noticed that the purposes specified in subdivisions 3 and 4 of this section are not included in section 69 of the County Law. The above section of the present law makes clear the requirement that a proposition must have been submitted at a town meeting authorizing the town to borrow money for the purposes specified, before any action may be taken by the board of supervisors, authorizing the issue of bonds. When such a proposition has been so adopted it becomes the duty of the board to authorize the issue.

**Power to borrow, generally.** The power to raise money for municipal purposes never means a power to borrow; it is intended that it be raised by taxation unless there be express provision of statute to the contrary. *Wells v. Town of Salina*, 119 N. Y. 280 (1890). The established theory is that money for all highway and bridge purposes be raised by annual tax, and without some express provision as that contained in the above section, the borrowing of money by a town is unlawful. A town superintendent of highways has no general authority, as such superintendent, to borrow money, or to give promissory notes, and thereby bind his successors in office. *Van Alstyne v. Freday*, 41 N. Y. 174 (1869).

**Submission of propositions.** Propositions are to be submitted at town meetings in the manner provided by the several sections of the Town Law applicable thereto. These sections have been considered in the note to section 92. A proposition for authorizing the borrowing of money for the purposes specified is to be submitted upon the application of at least twenty-five taxpayers upon the last town assessment-roll or by the town board. Such application must be in writing addressed to the town clerk and filed with him at least twenty days before the town meeting, and must plainly state the question desired to be voted upon and request a vote thereon at such town meeting. Town Law, § 32. A special town meeting may be called as provided in Town Law, § 23. In the calling of town meetings and the submission of propositions the provisions of the Town Law must be strictly complied with. It has been held that these sections of the Town Law were enacted not only to apply to propositions and questions which could be lawfully submitted to a town meeting at the time of the passage of such law, but to other propositions that could thereafter be submitted by reason of subsequent enactments. *People ex rel. Hovey v. Town Clerk*, 26 Misc. 220, 56 N. Y. Supp. 64 (1899).

**The sufficiency of an application** for the submission of a proposition at a town meeting under section 32 of the Town Law was considered in the case of *the Town of Oyster Bay v. Harris*, 21 App. Div. 227, 47 N. Y. Supp. 510 (1897); where it was held that the provisions of such section were not complied with, where it appeared that a sufficient number of qualified persons signed a paper denominated a "resolution" which recited that a certain sum should be raised on the faith and credit of the town, by an issue and sale of its bonds, and that the money raised and its interest should be charged upon the property of the town taxable therefor, for the purpose of grading and paving certain roads described in the resolution; the paper was not addressed to any person, body or officer, and did not state any question which the signers desired should be voted upon, nor did it request that any vote be taken thereon at the town meeting, and the signers, although taxpayers, were not described as such in the paper, all of which are necessary requirements under the statute.

**Powers of boards of supervisors in respect to issue of bonds.** The boards of supervisors have the general power to authorize a town to borrow money for town use and borrow on its credit and issue its obligations therefor, when, and in the manner authorized by law. County Law, § 12, subd. 6. But if the necessity exists to borrow money for any of the purposes specified in the above section, the proceedings must be taken as required by such section. In



respect to such purposes, section 12, subdivision 6 of the County Law is superseded.

**Limitation of indebtedness.** A town cannot be authorized to issue town bonds for any purpose when such issue, with the amounts issued and outstanding under any previous or other authority of the board of supervisors, shall exceed 10 per centum of the assessed valuation of the real estate of such town, as it shall appear on the last assessment-roll thereof, unless by the assent of a majority of the electors of such town, whose credit is proposed to be given, voting on the question at a regular town meeting of such town; but in no case shall the amount of such town obligation issued and outstanding exceed one-third of such assessed valuation. County Law, § 13. The limitation hereby imposed restricts the amount of town obligations issued and outstanding, including those issued pursuant to the above section of the Highway Law to one-third of the assessed valuation of the town. The result is that at no time may all of the town obligations, issued and outstanding, for any purpose at any one time exceed such limitation.

**Resolution authorizing issue of bonds.** It is provided in section 5 of the General Municipal Law that: "A funded debt shall not be contracted by a municipal corporation, except for a specified object, expressly stated in the ordinance or resolution proposing it; nor unless such ordinance or resolution shall be passed by a two-thirds vote of all the members elected to the board or council adopting it or submitted to, and approved by the electors of the town or county, or taxpayers of the village or city when required by law. Such ordinance or resolution shall provide for raising annually, by tax, a sum sufficient to pay the interest and the principal, as the same shall become due." It is also made the duty of the board of supervisors by section 98 of the Highway Law to impose a tax sufficient to pay the principal and interest of the bonds as they become due. The resolution of the board authorizing the issue of bonds for the purposes specified in this section must be in the form specified in section 14 of the County Law. Such section is as follows: "Every resolution of any such board, authorizing the issue of such obligations, shall specify the form thereof, the place of payment, in annual installments or otherwise, within a period not exceeding thirty years from the date of such obligation, and the rate of interest to be paid thereon, not exceeding the legal rate; and no such obligation shall be sold for less than par. Such resolution shall also contain a provision requiring adequate security to be given by the officer, or board of officers authorized to issue such obligations, for the faithful performance of his, or their duty, in issuing the same, and the lawful application of the funds arising therefrom, and of the funds which may be raised by tax for the payment thereof, which may come into their hands."

**Conditions imposed by boards of supervisors.** In legislating for a town under the provisions of this section, the board of supervisors may impose conditions as to details for the interest of the taxpayers, not specified in the statute, such as safeguards in the letting of contract, and provisions that the work shall be prosecuted under competent supervision and the money deposited with the county treasurer to be paid out only upon the certificate of the engineer; and such conditions when so imposed are binding upon the officers effected. People *ex rel.* Wakeley v. McIntyre, 154 N. Y. 628 (1898).

The board could not, however, impose any conditions which are inconsistent with the provisions of the Highway Law.

**Construction by two or more towns.** If a highway or bridge is on a dividing line between two or more towns in the same county, and it is proposed to borrow money for the construction, building, repairing or discontinuing thereof, as provided in this section, a proposition should be adopted in each town. Thereupon the board of supervisors may apportion the expense among the towns and authorize each of them to issue bonds to cover the amount so apportioned. As to liability for construction of bridges over streams constituting boundary lines of towns, see section 250, *post*.

**Forms.** The following forms will be found useful in carrying out the provisions of this section:

**FORM No. 36.**

**Application for Submission of Proposition.**

To A. F., town clerk of the town of ....., county of .....

The undersigned, taxpayers of the town of ..... or supervisor and town superintendent of highways, hereby make application, pursuant to the provisions of section 32 of the Town Law and section 97 of the Highway Law, for the submission of a proposition to be voted upon by ballot at the biennial [or special] town meeting to be held in the town of ..... on the ..... day of ....., 19...., for the following purposes and in the following form, to wit:

*Resolved*, That the town of ..... shall borrow the sum of ..... dollars for the erection of a bridge [or state any of the purposes mentioned in either of the four subdivisions of section 97 of the Highway Law], and that the town board of such town be directed to make application to the board of supervisors of the county of ..... for authority to issue the bonds of such town in an amount not exceeding the sum above specified, and that there be imposed upon the taxable property of such town a tax sufficient to pay the principal and interest of such bonds as they shall become due. And such applicants hereby request that a vote be taken upon such proposition at such town meeting.

Dated this ..... day of ....., 19....

[Signatures of taxpayers or supervisor and superintendent.]

The other forms relating to calling of special town meetings and the submission of propositions thereat contained in the note to section 92, *ante*, page —, may be adopted to the requirements of this section. The following form of the application to the board of supervisors for authority to issue bonds may be used:

**FORM No. 37.**

**Application to Board of Supervisors for Authority to Issue Bonds.**

To the Board of Supervisors of the county of .....

A proposition having been duly submitted at a biennial [or special] town meeting duly held in the town of ....., on the ..... day of ....., 19...., pursuant to the provisions of sections 30, 31 and 32 of the Town Law, and section 97 of the Highway Law, providing for the [specify

purposes stated in proposition] and for the borrowing of the sum of ..... dollars, and the issue of town bonds therefor for the purposes of aforesaid, and such proposition having been adopted by a majority of the electors of such town voting at such town meeting, as will appear from a record of the proceedings of such town meeting as to such proposition duly certified by the town clerk of such town and annexed to, and made a part of, this petition.

Wherefore, Pursuant to the provisions of section 97 of the Highway Law, we, the undersigned, members of the town board of the town of ....., do hereby respectfully petition your honorable board for authority to issue town bonds of such town, in an amount not exceeding the sum specified in said proposition, under such terms, conditions and restrictions as your said board may legally impose.

The fair cost and expense of the construction [specify purpose for which money is to be expended] is estimated as follows: [Insert in items the estimated cost of the proposed improvement, or if bridges are to be constructed, rebuilt or repaired, the estimated cost of each bridge, and all other matters pertaining thereto.]

Dated this ..... day of ....., 19.....

[Signatures of members of town board.]

**FORM No. 37a.**

**Certified Proceedings of Town Meeting.**

STATE OF NEW YORK, }  
 COUNTY OF            } ss..

I, A. F., town clerk of the town of \_\_\_\_\_, county of \_\_\_\_\_, State of New York, do hereby certify that at a biennial [or special] town meeting, held in the town of \_\_\_\_\_, at \_\_\_\_\_ in the village of \_\_\_\_\_, in said town, on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ the following proposition was duly submitted to the electors of said town:

[Insert copy of proposition as in Form No. 36.]

That there were 410 votes cast for and against such proposition. Upon a canvass of the votes so cast the following result appeared and was duly declared and entered:

Votes in favor of such proposition..... 310  
 Votes against such proposition..... 100

*In witness whereof*, I have hereunto set my hand and affixed the seal of said town of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

[Signed by town clerk, with seal.]

**FORM No. 38.**

**Resolution Authorizing Town to Borrow Money and to Issue Bonds.**

An act authorizing the town of \_\_\_\_\_, in the county of \_\_\_\_\_, to issue bonds pursuant to a proposition duly adopted at a town meeting held therein authorizing such town to borrow money for [State purpose specified in proposition.]

Passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, two-thirds of all the supervisors elected to the board of supervisors of such county voting in favor thereof.

The board of supervisors of the county of \_\_\_\_\_, in pursuance of

authority conferred by section 97 of the Highway Law, and in pursuance of the provisions of sections 12 and 14 of the County Law and sections 5, 6, 7, 8 and 9 of the General Municipal Law, do enact as follows:

*Whereas*, the town board of the town of \_\_\_\_\_, have made application to this board for authority to borrow the sum of \_\_\_\_\_ dollars upon the credit of said town and to issue the obligations of said town therefor, for the purpose of [specify purpose for which money is to be expended] pursuant to a proposition duly adopted by the qualified electors of such town at a biennial [or special] town meeting held therein on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; now, therefore, be it

*Resolved*, That the town of \_\_\_\_\_, in the county of \_\_\_\_\_, State of New York, be and is hereby authorized to issue its bonds upon the credit of such town to an amount not to exceed the sum of \_\_\_\_\_ dollars and to sell or cause the same to be sold at not less than their par value to the highest bidder at a rate of \_\_\_\_\_ per cent. per annum; and be it

*Resolved*, That such bonds shall be signed by the supervisor and the town clerk of the said town of \_\_\_\_\_, and the supervisor of such town shall negotiate the sale of such bonds according to law and as above provided, and that he shall apply the proceeds of the sale thereof to the payment of the cost and expense of [specify purpose for which money borrowed is to be expended], as provided in the Highway Law. That the said supervisor before issuing or negotiating the sale of said bonds, or any of them, shall make and execute by the town clerk of such town in behalf of and for the benefit of such town a good and sufficient bond or obligation in the penal sum of \_\_\_\_\_

dollars conditioned for the faithful performance of his duties in issuing such bonds and the lawful application of the funds which may be realized by the sale thereof, and of the funds that may be raised by tax or otherwise for the payment of the bonds issued in pursuance of this act, and the interest thereon, which may come into his hands. Such bond or obligation so made by the said supervisor shall be approved by the town board of such town and filed in the office of the town clerk; and be it further

*Resolved*, That such bonds shall be made payable at \_\_\_\_\_ bank in the city [or village] of \_\_\_\_\_ and that the interest on such bonds shall be paid at such bank, semi-annually, on July 1 and January 1 of each year. That \_\_\_\_\_ dollars of the principal sum of such bonds shall be made payable on January 1, 19\_\_\_\_ and \_\_\_\_\_ dollars thereof shall be made payable on January 1 of each and every year thereafter up to and including January 1 in the year 19\_\_\_\_; be it further

*Resolved*, That before any of the bonds authorized by this act shall be issued, a supervisor of the town of \_\_\_\_\_ shall advertise for sealed proposals for the amount or part thereof, of said bonds so authorized to be issued, or in amounts not less than five hundred dollars each, such advertisement to be published for two consecutive weeks prior to such issue, in the following newspapers; [specify newspaper in which advertisement shall be published]; and be it further

*Resolved*, That the form of said bonds shall be as follows:

No. \_\_\_\_\_ \$1,000.  
Bond of the town of \_\_\_\_\_, county of \_\_\_\_\_, and State of New York, for constructing [repairing or rebuilding] roads and bridges in said town.

Know all men by these presents, that the town of \_\_\_\_\_, county of \_\_\_\_\_, and State of New York, is held and firmly bound unto \_\_\_\_\_ in the sum of one thousand dollars to be paid to the said \_\_\_\_\_, his or their certain representatives, successors or assigns, on the 1st day of \_\_\_\_\_ 19\_\_\_\_, for which payment well and truly to be made the said town of \_\_\_\_\_ binds itself firmly by these presents.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

The conditions of this obligation is such that if the above bounden town of \_\_\_\_\_ shall well and truly pay or cause to be paid to the above named \_\_\_\_\_, his or their certain representatives, successors or assigns, the sum of one thousand dollars, and annual interest upon all sums unpaid thereon to be paid on the 1st day of \_\_\_\_\_, as the same shall accrue, at the rate of four per cent., from the date of the last payment thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

All payments of principal and interest to be made at the \_\_\_\_\_ bank in the city of \_\_\_\_\_, State of New York.

This bond is issued in pursuance of section 97 of the Highway Law and section 14 of the County Law, of the provisions of the General Municipal Law, and a resolution of the board of supervisors of \_\_\_\_\_, county, passed \_\_\_\_\_.

In witness whereof, the said town has caused these presents to be signed and sealed by the supervisor and town clerk of said town.

*Supervisor of town of \_\_\_\_\_*

*Town clerk of the town of \_\_\_\_\_*

[Town seal.]

There shall be attached to each of said bonds the proper number of interest coupons made payable in accordance with this act, and each of such interest coupons shall be signed by the said supervisor and the said town clerk; be it further

*Resolved*, That the board of supervisors of the said county of \_\_\_\_\_ shall assess and levy upon the taxable property of the said town of \_\_\_\_\_, a sufficient sum to pay the principal and interest of said bonds from year to year as the same shall mature, and the supervisor of said town of \_\_\_\_\_ shall report the amount of said principal and interest to the said board of supervisors as required by law.

**Certificate of Chairman and Clerk of Board.**

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } *ss.:*

We, the undersigned, chairman and clerk of the board of supervisors of the county of \_\_\_\_\_, for the year 19\_\_\_\_, do hereby certify that the foregoing is a true copy of an act passed by the said board, by a two-thirds vote of all the members elected thereto, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signed by chairman and clerk of board.]

§ 98. Issue and sale of town bonds.— The board of supervisors shall, from time to time, impose upon the taxable property of the

town a tax sufficient to pay the principal and interest of such obligations as they shall become due. The supervisors and town clerk shall each keep a record, showing the date and amount of the obligations issued, the time and place of their payment, and the rate of interest thereon. The obligations shall be delivered to the supervisor of the town, who shall dispose of the same for not less than par and apply the proceeds thereof for the purposes for which they were issued. Not more than five hundred dollars of such proceeds shall be expended upon any highway or bridge, except in pursuance of a contract executed by the town superintendent as provided in section forty-eight.

**Derivation.** This section is taken from County Law, § 70, and so much thereof as is inconsistent with the above section is superseded.

**Payment of town bonds.** It is provided in section 6 of the General Municipal Law that "Where the bonds of a municipal corporation have been lawfully issued, and the payment of the principal or interest thereof shall not have been otherwise paid or provided for, the same shall be a charge upon such corporation, and shall be levied and assessed, collected and paid the same as other debts and charges. When for any reason any portion of the principal or interest due upon such bonds shall not have been paid, the same shall be assessed, levied and collected at the first assessment and collection of taxes by such corporation after such omission." It is the duty of the town to provide for the payment of its bonds lawfully issued. In case of a failure to perform such duty, the holder of the bonds may maintain an action against the town thereon, although by the act under which they were issued it is made the duty of the board of supervisors of the county to impose and levy a tax to pay the bonds. Such settled and admitted obligations of the town need not be audited and allowed by the board of town auditors. *Marsh v. Town of Little Valley*, 64 N. Y. 112 (1876); *Horn v. Town of New Lots*, 83 N. Y. 101 (1880).

**Manner of issue of town bonds.** It is provided in section 8 of the General Municipal Law that "Each bond issued by a municipal corporation shall be signed by each officer issuing the same, with the designation of his office; and the interest coupons attached thereto, if any, shall be signed by one of their number. Each bond shall state the place of payment and, if no coupons are attached thereto, the name of the payee."

The fact that the names of the officers authorizing to issue the bonds were lithographed on the coupons of such bonds was held not to make them invalid, where it appeared that such officers adopted and delivered as their own the signatures in that form. *Beattys v. Town of Solon*, 64 Hun, 120, 19 N. Y. Supp. 37 (1892).

It has been held that to entitle a party to recover in an action upon bonds issued by a municipality there must be affirmative and extrinsic proof that all the preliminary conditions required to authorize the issue of such bonds have been complied with. *Starin v. Town of Genoa*, 23 N. Y. 439

(1861); *Town of Venice v. Woodruff*, 62 N. Y. 465 (1875); *Dodge v. County of Platte*, 82 N. Y. 218 (1880).

The recital contained in a municipal bond should show the authority under which the officer acted who executed it. The reason for this is shown from the principle stated in the case of *Dodge v. Platte*, 82 N. Y. 218, 230 (1880) where it was held that since the recital in the bonds did not show or tend to establish any power or authority to issue the same, the plaintiff could not be regarded as a bona fide holder of the bond for value without notice; for there is no presumption in favor of the validity of bonds issued under statutory authority where the recital is such as to put the holder upon inquiry. A recital, when all necessary legal steps and proceedings have been taken to comply with the laws under which the bonds were issued does not estop the town board from disputing their validity, even in the hands of a bona fide holder. *Starin v. Town of Genoa*, 23 N. Y. 439 (1861); *Craig v. Town of Andes*, 93 N. Y. 405 (1883).

**Term of bonds.** This section does not prescribe the term for which the bonds may be issued. Long term bonds are permissible. It has been held that bonds issued to run for thirty years with legal interest and payable in gold are valid. *Ghiglione v. Marsh*, 23 App. Div. 61, 48 N. Y. Supp. 604 (1897). It was also held in this case that the supervisors may direct that the interest on the bonds, sold at a premium be paid out of the proceeds of the sale, until the tax provided to pay the same can be collected.

It is provided in section 11 of the General Municipal Law that "When the bonds of a municipal corporation have been issued and sold by the proper authorities, and the time fixed for their maturity shall be for a longer period than provided by the law under which they were issued, a variance of not exceeding sixty days shall not affect their validity."

The proceeds of bonds sold as provided in this section must be retained by the supervisor and expended by him for the purposes for which the bonds were issued. Such expenditures are to be made by the supervisors upon the written order of the town superintendent after audit by the town board, as provided in section 106, *post*.

**§ 99. Assessment of village property.**—In any town in which there may be an incorporated village, which forms a separate road district, and wherein the roads and streets are maintained at the expense of such village, all property within such village shall be exempt from the levy and collection of taxes levied in the town, as provided by section ninety-one of this article, for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet. The assessors of such town shall indicate in a separate column the value of the real and personal property included in such incorporated village.

**Derivation.** This section is taken from the part of section 53 of the former Highway Law, as amended by L. 1907, chap. 716, which relates to exemptions of village property from highway taxation.

**Time of taking effect.** This section takes effect May 19, 1908. See section 317, subd. 1, *post*.

**Villages as separate road districts.** By section 141 of the Village Law it is provided that "the streets and public grounds of a village, except as provided in the next section are under the exclusive control and supervision of the board of trustees. The board of trustees may expend a portion of the street fund upon outside highways connecting with the village streets."

Section 142 of the Village Law provides that "If at the time this chapter takes effect, the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control under this chapter. In any other case, every public bridge within a village shall be under the control of the commissioners of highways of the town in which the bridge is wholly or partly situated or such other officer as may be designated by special law, and the expense of constructing and repairing such bridge and the approaches thereto is a town charge, unless the village assumes the whole or part of such expense."

**Exemption from taxation.** The exemption of village property from taxation only extends to taxes levied for the repair and improvement of highways. Villages are not exempt from taxation for any of the other purposes specified in section 90, *ante*. The exemption applies in every case where an incorporated village within a town is a separate road district.

From a certain class of public charges or expenses connected with the highways the villages are exempt, while to another class they are subject. Bonds issued by a town for the permanent improvement of highways and for the construction and repair of bridges are a charge upon the whole town including the villages within it. *Matter of Shapter v. Carroll*, 18 App. Div. 390, 46 N. Y. Supp. 202 (1897).

**Assessment-roll.** Under the former law the assessors were required to indicate on the assessment-roll "the property included in such incorporated village, in a column separate from that containing a list of the property in the town not included in such village." By the above section the assessors are required to indicate in a separate column the value of the real and personal property included in the village. Section 21 of the Tax Law has been amended by L. 1908, chap. 437, to provide for this change in the law. It is provided in subdivision 7 of that section as so amended that there shall be placed "in the seventh column the total value of the property above enumerated which is included within an incorporated village."

§ 100. **Statement by clerk of board of supervisors.**—The clerk of the board of supervisors of each county shall, on or before the first day of January of each year, transmit to the state comptroller and the commission a statement, signed and verified by the chairman of the board, and certified by the clerk, which shall state the name of each town, the assessed valuation of real property, and the assessed valuation of personal property, each separately, in the towns outside incorporated villages, and the amount of tax levied therein for the repair and improvement of high-



ways, including sluices, culverts and bridges having a span of less than five feet. The towns' valuation of real property to be used in such statement shall be the valuation thereof, as equalized by the boards of supervisors, or other competent authority, during the year prior to the levy of taxes upon which is based the determination of the amounts to be paid to the several towns, as provided in this article.

**Derivation.** The parts of former Highway Law, § 53, as amended by L. 1907, chap. 716, from which this section was derived, was as follows: "the clerk of the board of supervisors of each county containing a town which has voted for the money system shall on or before the first day of January in each year transmit to the state comptroller a statement certified by him and signed and verified by the chairman of such board, stating the name of each town so voting, the assessed valuation of the real property and the assessed value of personal property, separately in the town outside of incorporated villages, and the amount of money tax levied therein during the preceding year for the repair of highways." The last sentence of the above section is new.

**Time of taking effect.** This section takes effect May 19, 1908. See section 317, subd. 1, *post*.

**Object of statement.** The purpose of this statement is to afford the State Comptroller and the commission information sufficient to permit a payment to each town of the amount to which it is entitled under section 100. The amount so to be paid to each town is based upon the amount of taxes levied therein for the repair and improvement of highways. The final estimate of the amounts to be raised for highway purposes within the town being approved by the town board, and submitted to the board of supervisors, it becomes the duty of the board to levy a tax upon the town sufficient to meet highway requirements during the ensuing year. The amount of taxes levied for the repair and improvement of highways should be kept separately from the taxes levied for the other purposes mentioned in such estimate so that the clerk of the board of supervisors may prepare the statement required by this section.

State aid is not only allowed on account of moneys raised for the repair and improvement of highways. If an additional amount is raised for such repair and improvement, as provided in section 92, it should be included in the statement.

**Time of filing.** It has been held by the Attorney-General that the provision as to time of filing is directory not mandatory. He says "I think it is safe to say that where there is nothing contingent upon the performance within the time prescribed, it would impose extra hardship or materially impede the established course of action in matters dependent upon this section, that the time should be construed as directory; or in other words that it was the legislative intent in fixing the time that it should be near or about such time." He therefore concluded that the statement of the clerk of the board of supervisors filed on the fifteenth day of January would have the same force and effect as if it had been filed on or before

the first day of January as required by law. Report of Attorney-General (1900), 131, see also report of Attorney-General (1901), 154.

The statement should be executed in duplicate, one to be forwarded to the commission and the other to the Comptroller. Such statement may be in the following form:

FORM No. 39.

Statement of Money Raised for Highways.

To the Comptroller of the State of New York:

The following is a statement, submitted as required by section 100 of the Highway Law, of the amount of tax levied by the board of supervisors of the county of \_\_\_\_\_ upon the several towns therein, at their annual session in the month of \_\_\_\_\_, 19\_\_\_\_, for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet, pursuant to sections 90, 91, 92, 93, 94 and 95 of the Highway Law:

NAME OF TOWN.	Assessed valuation of Real Estate in whole town, including incorporated villages.	Equalized valuation of Real Estate in whole town including all incorporated villages.	Assessed valuation of Real Estate exclusive of all incorporated villages.	Assessed valuation of Personal Property exclusive of all incorporated villages.	HIGHWAY TAX.			Total.
					Ordinary H. L. § 9.	Additional H. L. § 92.	Extraordinary H. L. § 93.	

I certify that the preceding statement is correct.

.....;

Chairman, Board of Supervisors.

.....;

Clerk of Board of Supervisors.

STATE OF NEW YORK, } ss.:  
COUNTY OF \_\_\_\_\_ }

\_\_\_\_\_, being duly sworn deposes and says that he is is the chairman of the Board of Supervisors of \_\_\_\_\_ county, that he has read the foregoing statement and that the same is true, to his own knowledge.

.....

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

.....

§ 101. Amount of state aid.— There shall be paid by the state to the several towns, in the manner hereinafter provided, an amount based upon the amount of taxes levied therein for the repair and improvement of highways, sluices, culverts and bridges

having a span of less than five feet, and to be determined as follows:

1. In towns where the assessed valuation of real and personal property, exclusive of such property in incorporated villages, shall be less than five thousand dollars for each mile of highways in such towns, outside of incorporated villages, an amount equal to the amount of such taxes.

2. In towns where such assessed valuation shall be five thousand dollars or over and less than seven thousand dollars for each mile of such highways, an amount equal to ninety per centum of the amount of such taxes.

3. In towns where such assessed valuation shall be seven thousand dollars or over and less than nine thousand dollars for each mile of such highways, an amount equal to eighty per centum of the amount of such taxes.

4. In towns where such assessed valuation shall be nine thousand dollars or over and less than eleven thousand dollars for each mile of such highways, an amount equal to seventy per centum of the amount of such taxes.

5. In towns where such assessed valuation shall be eleven thousand dollars or over and less than thirteen thousand dollars for each mile of such highways, an amount equal to sixty per centum of the amount of such taxes.

6. In towns where such assessed valuation shall be thirteen thousand dollars or over for each mile of such highways, an amount equal to fifty per centum of such taxes. Provided that no town shall receive from the state in any year, under this section, an amount exceeding an average of twenty-five dollars per mile, for the total mileage of its highways outside of incorporated villages, except that in towns where the assessed valuation of real and personal property therein, exclusive of such property in incorporated villages, averages more than twenty-five thousand dollars for each mile of highways therein outside of such villages, the amount paid hereunder shall not exceed one-tenth of one per centum of such assessed valuation.

**Derivation.** This section is taken from former Highway Law, § 53, in part, as amended by L. 1907, chap. 716. There is no change in substance, but the section is arranged in subdivisions for convenience.

**Basis of contribution.** The former law expressly provided that "assessments made for damages and charges for laying out or altering any road, and

for removing any obstruction caused by snow or preventing any such obstructions, or for erecting or repairing any bridge in such town which shall have a span exceeding five feet, or for paying any rebate of highway taxes, or for the purchase of any machinery, tools or implements, or for the repair or construction of any sidewalk," shall not be considered in determining the amount of state aid to the town. The present section is the same in effect for it provides that the state shall pay to the town "an amount based upon the amount of taxes levied therein for the repair and improvement of highways, sluices, culverts and bridges having a span of less than five feet.

Any tax levied upon a town for the repair and improvement of highways, either (1) pursuant to the annual estimate approved by the town board as provided in section 91, or (2) for the purpose of providing additional funds as provided in section 92 for such repair or improvement, or (3) for the purpose of making needed repairs to highways which have been damaged or destroyed by the elements as provided in section 93, may be considered in determining the amount to be paid by the State to the town under this section. A tax levied for the erection and repair of bridges with a span of over five feet, for the purchase of machinery, for the removal of obstructions caused by snow, or for any miscellaneous purpose is to be excluded. Where road machinery is hired by the town superintendent as authorized by section 50, *ante*, the rental thereof is to be paid out of moneys raised by tax for the repair and improvement of highways, and therefor such rental may be included.

The mileage and assessed valuation used in determining the amount to be paid to each town under this section is that provided for in section 102.

§ 102. **Mileage and assessed valuation.**— The mileage of highways in towns to be used in determining the amounts to be paid to such towns under the provisions of this article shall be the tables of mileage heretofore prepared by the state engineer, until the corrected tables of mileage prepared as provided in section fifteen of this chapter are filed. Such tables and all corrections thereof shall be filed with the commission and comptroller. The assessed valuation of real property to be used in determining such amounts shall be the valuation thereof, equalized as provided in section one hundred and forty-one of this chapter, during the year prior to the levy of taxes upon which is based the determination of the amounts to be paid to the several towns, as provided in this article.

**Derivation.** This section is taken from former Highway Law, § 53, in part, as amended by L. 1907, chap. 716, without change, except that the assessed valuations to be used are those equalized by the state board of equalization and the board of supervisors during the year prior to the levy of taxes in the town, thus avoiding delay in determining the amounts to be paid to the several towns.

The mileage to be used in determining the amounts to be paid to the towns is that of the highways outside of incorporated villages. Subd. 12 of section 15 of the present law requires the commission to prepare tables showing the total number of miles of highways in the state. Within six months after the taking effect of this chapter, the town superintendent is required to measure the highways in his town, and report the same to the commission. See section 69, *ante*.

§ 103. **Payment and distribution of state money.**—The comptroller shall determine the amount due to the several towns, under the provisions of this article, and shall draw his warrant upon the state treasurer in favor of the county treasurer of each county for the total amount to be paid to the towns in such county, as so determined by him, and shall indicate the amount to be paid to each town. The county treasurer shall pay to the supervisor of each town the amount to which such town is entitled, as determined and indicated by the comptroller. No such payment shall be made until the supervisor has filed in the office of the county treasurer a certified copy of the undertaking given by him, as provided in this article.

**Derivation.** This section is taken from former Highway Law, § 53, in part, as amended by L. 1907, chap. 716.

The comptroller is required under this section to determine from the statement transmitted to him by the clerk of the board of supervisors of each county and the tables of mileage filed in his office as provided in section 15, subdivision 12, the amount which shall be paid to the several towns under the provisions of section 101. The amount is in the first instance to be paid to the county treasurer and to be distributed by the county treasurer to the supervisors of the several towns as indicated by the Comptroller. As soon as the supervisor qualifies by filing in the office of the county treasurer the undertaking required by the next section, the money should be paid to him.

§ 104. **Custody of highway moneys; undertaking of supervisor.**—All moneys levied and collected, as provided in this article, all moneys collected as penalties under this chapter, or received from any other source and available for highway, bridge and miscellaneous purposes and all moneys received from the state, as provided in section one hundred and one, shall be paid to the supervisor, who shall be the custodian thereof, and accountable therefor. Before receiving any such moneys the supervisor shall give an undertaking to the town in an amount to be specified by the commission and with such sureties, as shall be approved by

the town board, conditioned for the faithful disbursement, safe-keeping and accounting of the moneys so received by him. Such undertaking shall be filed in the office of the town clerk and a certified copy thereof shall be filed in the office of the county treasurer before any moneys received from the state shall be paid to him, and also in the office of the commission. In case of a failure of the supervisor to faithfully disburse, safely keep or account for moneys received from the state the commission may bring an action on such bond in the name of the town.

**Derivation.** This section is taken from former Highway Law, § 53, in part, as amended by L. 1907, chap. 716. This section is extended in the present law so as to apply to the moneys received from any source for highway and bridge purpose. The part of section 53 of the former Highway Law which pertains to the custody of highway moneys is as follows: "All moneys collected for the repair and construction of highways in any town under this section, and all moneys received from the state as provided herein, shall be paid to the supervisor of the town, who shall be the custodian thereof and shall be accountable therefor. Before receiving any such moneys the supervisor shall give an undertaking to the town in an amount and with such sureties as shall be approved by the town board, conditioned for the faithful disbursement, safe keeping and accounting of the moneys that may come into his hands under this section. Such undertaking shall be filed in the office of the town clerk and a certified copy thereof shall be filed in the office of the county treasurer before any moneys shall be paid to the supervisor." It will be noticed that it is required by the present section to file a certified copy of the undertaking in the office of the commission and that the commission may bring an action upon such undertaking in the name of the town, in case of the default of the supervisor.

**As custodian of highway moneys.** In money system towns receiving aid from the state the supervisor was, under the former law, the custodian of moneys raised in the town or received from the state to be used in the repair and improvement of highways. The highway commissioner retained control over the other moneys raised for other highway purposes. Such moneys were required to be paid by the collector to the highway commissioner. The present law deprives the town superintendent of his control over all moneys raised in the town for any highway or bridge purpose. Such moneys received from all sources are to be paid direct to the supervisor. The town superintendent thus becomes the administrative highway officer of the town with duties expressly restricted to the actual construction or improvement of highways and bridges. He is not, but the supervisor is, accountable for the faithful disbursement and safe keeping of moneys received from any source which is available for highway and bridge purposes.

The reason why it is proper that the supervisor should be the custodian of the highway moneys is that under the general scheme of town government the supervisor is the chief fiscal officer of the town. He has always been the custodian of the moneys raised for town purposes other than those for

highways and bridges and the support of the poor. The statute which relates generally to his powers and duties assumes that he is the local custodian of the moneys of the town and chargeable with the duty not only of receiving and keeping them, but also of guarding their disbursement. *Bridges v. Board of Supervisors*, 92 N. Y. 570 (1883).

**Undertaking of supervisor.** The undertaking required by this section is in addition to the regular official undertaking required to be given by the supervisor under section 60 of the Town Law. The undertaking herein required is for the purpose of protecting the town from any improper administration of the highway finances of the town. It is intended as an additional security to that afforded by his regular official undertaking. The condition thereof is limited to the "faithful disbursement, safe keeping and accounting of the moneys received by him under this chapter." If there is any failure to properly perform his official duties recourse must be had to his official undertaking. As to general provisions respecting official undertakings, see Public Officers Law, §§ 10-13, *ante*.

The form of the undertaking and the liability thereon are controlled by Town Law, § 66. This section provides that "every undertaking of a town officer, as provided by this chapter *or otherwise*, must be executed by such officer and his sureties and acknowledged or proven and certified in like manner as deeds to be recorded, and the approval indorsed thereon. The parties executing such undertaking shall be jointly and severally liable regardless of its form in that respect for the damages to any person or party by reason of a breach of its term." In addition to the provisions contained in this section relating to the execution of an official undertaking reference should be made to sections 11 and 12 of the Public Officers Law.

It is provided in section 60a of the Town Law, as added by L. 1906, chap. 81 that "The supervisor in any town may purchase a surety bond of some solvent surety company, authorized to do business in the State of New York, securing to such supervisor the safety of town funds deposited by him in any bank or banking institution in this state and indemnifying him against the loss thereof through the failure or insolvency of such bank or banking institution, and the cost of such bond or bonds shall be a town charge and shall be audited and paid in the same manner as other town charges."

The amount of the undertaking of the supervisor is to be fixed by the commission.

**Liability for breach of bond.** The fact that the supervisor of a town in good faith deposited as a general deposit, moneys received by him in his official capacity, with a reputable firm of individual bankers, believed to be solvent and that thereafter such firm failed and such moneys were lost is not a defense to an action brought upon the bond of such supervisor. *Tillinghast v. Merrill*, 77 Hun, 481, 28 N. Y. Supp. 1089 (1894).

The liability upon the bond given under this section can only extend to moneys received by the supervisor under this section. See *Bissell v. Saxton*, 66 N. Y. 55 (1876).

**Form of undertaking.** The undertaking to be given by the supervisor under this section may be in the following manner:

## FORM No. 40.

## Undertaking of Supervisor.

Know all men by these presents that we, John Allan, supervisor of the town of \_\_\_\_\_, county of \_\_\_\_\_, and State of New York, as principal, and Charles Smith and David Ely, of the town and county aforesaid, as sureties, are held and firmly bound unto the said town of \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars [an amount to be specified by the commission] for the payment of which to such town, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and delivered  
this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

The condition of this undertaking is such that if the above named John Allan, as supervisor of such town, shall safely keep, faithfully disburse, and fully and justly account for and pay over all moneys received by him as such supervisor of such town from highway taxes levied and collected as provided in Article V of the Highway Law, all moneys collected by him as penalties under such law, all moneys received by him from any source and available for highway, bridge and miscellaneous purposes and all moneys received by him from the county treasurer on account of the apportionment to such town of moneys appropriated by the state, pursuant to and under the provisions of section 101 of the Highway Law, then this undertaking shall be void, and otherwise to remain in full force and effect.

John Allan, *Supervisor*  
Charles Smith, }  
David Ely, } *Sureties.*

[Acknowledgement and justification in the form prescribed by Form No. 1, *ante*, p. 32.]

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } *ss.:*

The undersigned, members of the town board of the town of \_\_\_\_\_ herby approve of the within undertaking as to its form and manner of execution, and of the sufficiency of the sureties thereon.

Dated, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

[Signatures of members of town board.]

### § 105. Expenditures for repair and improvement of highways.

— The moneys levied and collected for the repair and improvement of highways, including sluices, culverts and bridges having a span of less than five feet, and the moneys received from the state, as provided by section one hundred and one, shall be expended for the repair and improvement of such highways, sluices, culverts and bridges, at such places and in such manner as may be agreed upon by the town board and town superintendent. The town board and the town superintendent shall constitute a board



for the purpose of determining the places where and the manner in which such moneys shall be expended. Such agreement shall be written and signed in duplicate by a majority of the members of the board so constituted, and shall be approved by the commission, before the same shall take effect. One of such duplicates shall be filed in the office of the town clerk and one in the office of the district or county superintendent. Such moneys shall be paid out by the supervisor on the written order of the town superintendent in accordance with such written agreement.

**Derivation.** This section is derived from former Highway Law, § 53, in part, as amended by L. 1907, chap. 716. The part of such section from which this section was derived reads as follows: "The moneys collected under this section and received from the state as provided by this section, shall be paid out by the supervisor upon the written order of the commissioner or commissioners of highways for the repair and permanent improvement of the highways of the town, but no payment shall be made until the town board and the commissioner or commissioners of highways have determined how and where the money shall be expended and the commissioner or commissioners of highways have entered into a written agreement with the town board to expend said moneys as thus determined, and the said agreement has been approved by the state engineer and surveyor." It will be noticed that the provision in the present law requiring the filing of the agreement in the office of the town clerk and in the office of the district or county superintendent is new.

**Application of section.** This section applies only to moneys raised by tax for the repairs and improvement of highways as provided in sections 90, 91 and 92 and the moneys received from the state as provided in section 101. These moneys can only be expended for the repair and improvement of highways. None of the moneys may be expended for any other purpose. Expenditures for all other purposes than the repair and improvement of highways must be made pursuant to section 106.

**Agreement as to expenditure.** The members of the town board and the town superintendent may decide the place where the manner in which moneys are to be expended for the repair and improvement of highways in the town. These officers constitute a board, each member being entitled to a vote. When the determination is made as to where and how the money is to be expended, an agreement must be drawn up and signed in duplicate by a majority of the members of the board. The town superintendent only constitutes a single member of this board. If the town board is opposed to him they may control the situation. Nothing can be done under such agreement until it be approved by the commission. The agreement when executed should be submitted forthwith to the commission. Although the law requires the execution of the agreement in duplicate, a copy will be required for the use of the commission, and it would be proper to execute the agreement in triplicate so that when approved the commission may return two copies for filing, one with the town clerk and one with the district or county superintendent, and retain the other in its office.

It was held under the former law by the Attorney-General that the State Engineer might provide by regulation to the effect that a county treasurer shall not pay over to the supervisor moneys received by him from the State for the benefit of the town until an agreement has been entered into on the part of the highway commissioner and town board. Report of Attorney-General (1906) 355.

**Powers of commission in respect to expenditure.** The commission having the power of approval is authorized to direct and suggest as to the manner in which repairs and improvements shall be made. The commission may insist that every mile of town highway shall be properly cared for by opening ditches, cleaning culverts, sluices and repairing the same; scraping the roads and removing all loose stone once each month from the beaten track of the highway; cutting and removing noxious weeds and brush and such other work as may seem necessary.

Under the former law the Attorney-General held that all moneys raised for highway purposes by the state or town was, at least to a limited extent, under the control and supervision of the State Engineer, and that he had the power of directing how the improvements should be made, for the payment of which said money or taxes are raised; and that when a highway commissioner or town board violated and disregarded any of the reasonable regulations or directions made by him with respect to the improvement of any highway, he might notify the comptroller, county treasurer or supervisor in whose hand the money might be to refrain from making any further payments for work or material used upon a highway with respect to which such instructions and directions had been disregarded, and that no payment could therefor be lawfully made for such work or material until such instructions had been complied with. Report of Attorney-General (1906) 355.

**Purposes for which expenditures may be made.** The money to be expended by a town in the repair and maintenance of its highways, a portion of which is to be contributed by the State must be expended in the improvement and betterment of the highways, and not in the payment of salaries of town officers or the purchase of personal property, the title of which would vest in the town. Report of Attorney-General (1906), 341.

The opening and laying out of new highways is provided for separately and apart from the care and maintenance of highways and expenditures therefor cannot be made from the fund levied, collected and received as provided in this chapter for the repair and improvement of highways, a part of which is contributed by the State. Report of Attorney-General (1904) 308.

Sidewalks are a part of the highways and moneys raised and collected for the repair and improvement of highways, and moneys received by the State thereof, may be expended in the repair of sidewalks. Report of Attorney-General (1901) 213.

None of the amount collected by tax or received from the State for the repair and improvement of highways may be expended for the erection or repair of bridges having a span of more than five feet.

**Expenditures in accordance with agreement; audit.** The agreements entered into by the town board and town superintendent controls the expenditures of moneys received by taxation or from the State for the repair and improvement of highways. Such money is to be paid out by the supervisor

on the written order of the town superintendent. There is no provision made for the audit of claims arising on account of such repair and improvement. The town board in the first instance determines, upon estimates made by the town superintendent, as to the amount of money which should be levied in the town for such purpose. This amount determines the amount received by the State. Both funds are in the custody of the supervisor available for the purposes for which they were raised or received. The agreement must then be made, under this section, determining the manner in which, and the places in the town where, such moneys are to be expended, which is within the control of the town board. Hence it follows that the necessity of an audit in respect to the expenditures of such moneys is eliminated. The town superintendent and supervisor are responsible for the legitimate expenditure of the money and either of them may be liable for a failure to conform to the agreement or to lawfully apply the money for the purposes for which they are raised.

The form of the agreement to be entered into between the town superintendent and town board will be prescribed by the commission, and blanks will be duly furnished. Such agreement may be in the following form:

#### FORM No. 41.

##### Agreement for Expenditures of Highway Moneys.

*This agreement* entered into this                    day of                    19                    by and between John Smith, town superintendent of highways, and the undersigned members of the town board of the town of                    , county of                    , constituting a board for the purpose of determining the places where and the manner in which the moneys levied and collected in such town for the repair and improvement of highways and the moneys received from the State as provided in section 101 of the Highway Law for such purpose, shall be expended.

*Witnesseth*, that the said moneys shall be expended for the following purposes and in the following manner:

1. For the improvement of the highway known as                    , commencing at                    and leading to                    , a distance of                    miles, at the following places: [describe the portions of highways to be improved in detail]. Such improvement shall consist of [specify manner of improvement]. The amount to be expended for such improvement shall not exceed the sum of                    dollars.

2. [State in subdivisions such other highways as are to be improved or repaired, specifying place, manner and amount to be expended].

3. For the permanent improvement of that portion of the highway leading from [locate highway] at a point near the residence of                    to a point near the school house of school district No. 11 of the town of                    [or state distinctly the portion of the highway to be improved], by the proper grading of such portion of such highway and the construction of a gravel road bed therefor, in accordance with plans and specifications to be furnished by the county superintendent; such improvement to be done by contract awarded as provided in the Highway Law, the total cost thereof not to exceed the sum of                    dollars.

4. For the rebuilding and repair of sluices, culverts and bridges, having a span of less than five feet in all the highways of the town in such a manner as will place them in a safe and proper condition, in the discretion of the town superintendent, at a cost not exceeding the sum of \_\_\_\_\_ dollars.

5. For the ordinary repair of all the highways in such town, by the removal of stone, the cleaning of ditches and drains, and by the scraping, rounding and rolling of the same by the use of road machines, rollers and other machines and implements, at a cost not exceeding the sum of \_\_\_\_\_ dollars.

[Signatures of town superintendent and members of town board.]

§ 106. **Expenditures for bridges and other highway purposes.**—The moneys levied and collected, or raised by the issue and sale of bonds or certificates of indebtedness in anticipation of taxes, as provided in this article, for purposes other than the repair or improvement of highways, as specified in the preceding section, shall be paid out by the supervisor upon the written order of the town superintendent after audit of the town board. Such audit shall be made on verified accounts presented to the town board at a regular or special meeting called for such purpose by the supervisor, or in his absence, by the town clerk, upon the request of the town superintendent. An account shall not be so audited or paid unless the expenditure be in accordance with the annual estimate of the town superintendent, as approved or modified by the town board, or be authorized by the town board or by a vote of a town meeting, as provided in this article, or be lawfully a charge upon the town. Except as herein otherwise provided the provisions of the town law relating to the audit of town accounts and claims shall apply to accounts and claims against the town arising under this chapter.

**Derivation.** In the report submitted by the joint committee on highways, of which Senator Allds was chairman, there is appended to the above section the following note:

“Highway Law, § 11, provides for special meetings of the town board to audit claims arising from the erection and repair of bridges and highways damaged or destroyed by the elements or otherwise. Highway Law, § 53, as amended by L. 1907, chap. 716, provides for the expenditure of money raised by tax or received from the State for the ordinary repair and improvement of bridges to be paid out by the supervisor upon the order of the highway commissioner in accordance with the agreement entered into by the commissioner and the town board. This method of expenditure is retained in the preceding section. It is intended by this section to provide that all other expenditures for highway and bridge purposes shall be made after audit by the town board in the same manner as charges against the town are audited. It is thought best to provide that the town board may in emergency cases

meet for the purpose of auditing claims which should be immediately disposed of."

**Meeting of town board for audit.** The regular meeting for the audit of town accounts is held on the Thursday preceding the annual meeting of the board of supervisors. Town Law, § 162, as amended by L. 1906, chap. 505. It is at this meeting that claims arising for highway and bridge purposes, "other than the repair and improvement of highways" must be submitted, unless a meeting of the town board be called for such purpose upon the request of the town superintendent. It has been held that unless otherwise especially authorized by law a town board can only audit claims against the town at its annual meeting, held on the Thursday preceding the annual meeting of the board of supervisors. People *ex rel.* Lowell v. Town of Westford, 53 Barb. 555, affirmed 41 N. Y. 619 (1867).

**Audit, how made.** The above section limits the audit to claims for which provision has been made in the annual estimate of the town superintendent as approved by the town board, or which have been authorized by the town board or a town meeting. Any claim, however, which is lawfully a charge upon the town and relates in any way to highways and bridges, is properly audited under this section.

There is no mode of procedure prescribed by statute by which a town board or board of town auditors are to take, approve or obtain knowledge respecting the validity of any claim presented for audit. Such bodies may properly seek information from any quarter where it is obtainable. Their members should acquire knowledge so as to enable them to act with wisdom in respect to the account which is submitted. They may act upon their own knowledge acquired by observation or upon knowledge acquired by special investigation of the particular subject. People *ex rel.* Oppenheimer Publishing Co. v. People, 81 Hun, 383, 30 N. Y. Supp. 878 (1894); People *ex rel.* Cochran v. Town Auditors, 74 Hun, 83, 26 N. Y. Supp. 122 (1893). It should be remembered that the town board is a tribunal created by statute to hear, allow or reject claims presented against the town. The examination of the account by the board is the trial; its allowance or disallowance is the judgment of this tribunal. No claim against the town is obligatory upon it or enforceable against it until it has been audited or examined and allowed. Osterhoudt v. Rigney, 98 N. Y. 234 (1885). So where a claim is presented for any highway or bridge purpose the board must consider the facts in the case and determine from them whether such claim is a valid one and should be paid by the town.

**Allowance, disallowance or rejection of claim.** The power of a town board to audit includes the power to hear the parties interested, examine the account, and, in its broader sense, it includes an adjustment either by allowance, disallowance in part or entire rejection. People *ex rel.* Myers v. Barnes, 114 N. Y. 317, 20 N. E. 609 (1889); People *ex rel.* Read v. Town Auditors, 85 Hun, 114, 32 N. Y. Supp. 668 (1895); Lythe & Sons v. Town of Evans, 33 Misc. 221, 68 N. Y. Supp. 356 (1900).

The Town Law, section 162, as amended by L. 1906, chap. 505, provides: "If any account is wholly rejected the board shall make a certificate to that effect signed by at least a majority of them, and file the same in the office of the town clerk. If the account is allowed wholly or in part the board shall make a certificate to that effect signed by at least a majority

of them, and if allowed only in part, they shall state in the certificate the items or parts of items allowed and the items or parts of items rejected and shall cause a duplicate of every certificate allowing an account wholly or in part to be made, one of which duplicates shall be delivered to the town clerk of the town to be kept on file for the inspection of any of the inhabitants of the town; and the other shall be delivered to the supervisor of the town to be by him laid before the board of supervisors at their annual meeting."

If the town board has consented that a superintendent shall construct a bridge, it becomes its duty to audit his bill on the merits when it is duly presented to the board for that purpose. *People ex rel. Slater v. Smith*, 83 Hun, 432, 31 N. Y. Supp. 749 (1894).

Each account is required to be made out in items. Such an account must be considered item by item and if the board fails to pass upon each item, a proper audit may be directed by mandamus. *People ex rel. Hamm v. Board of Auditors*, 43 App. Div. 22, 59 N. Y. Supp. 615 (1899). An arbitrary deduction from the gross sum of a bill for various items for services, the compensation for which is regulated by statute, without passing upon and disallowing any specific item is not an audit. *People ex rel. Thurston v. Town Auditors*, 82 N. Y. 80 (1880).

**Form of account; verification.** Town Law, § 167, provides as follows: "No account shall be audited by any board of town auditors or supervisors or superintendent of the poor for any services or disbursements unless such account shall be made out in items and accompanied with an affidavit attached thereto, and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct and that the disbursements and services charged therein have been in fact made or rendered or are necessary to be made or rendered at that session of the board, and stating that no part thereof has been paid or satisfied; and the chairman of the board or either of the superintendents may administer any oath required under this section."

It has been held that if an account is not in proper form the town board may refuse to audit. *People ex rel. Mason v. Board of Supervisors*, 45 Hun, 62 (1887). The presentation of a claim which, through inadvertence is so informal or defective as to justify its disallowance for that reason, is not a bar to a subsequent presentation of the same claim in proper form. *People ex rel. Andrus v. Town Auditors*, 33 App. Div. 277, 53 N. Y. Supp. 739 (1898).

**Services of member of town board.** Section 162 of the Town Law, as amended by L. 1906, chap. 505, provides as follows: "No member of the town board or board of town auditors shall present a claim or demand against the town for audit which has been assigned by him to another, or for labor, services or material rendered or furnished by himself, or by another as his servant or agent or under contract with him, or any claim or demand of any name or nature wherein he has an interest, direct or indirect, excepting his per diem compensation for attendance upon meetings of the town board of said town and the fees allowed to him by law for services rendered in his official capacity; and no claim or demand in which a member has an interest or which is based wholly or partly on services or material rendered or furnished by such member shall be audited or allowed by said board in favor of any person or corporation."

**Review of audit.** The term "audit" as applied to the action of a board of town auditors, means to hear and examine; it includes both the adjustment or allowance and the disallowance or rejection of an account. As a general rule no claim against a town is obligatory upon or enforceable against it until it has been audited and allowed by said board. Its jurisdiction over such claims is not only original, but its decision is conclusive until reversed or modified in proceedings by certiorari. *People ex rel. Myers v. Barnes*, 114 N. Y. 317 (1889); *Lyth & Sons v. Town of Evans*, 33 Misc. 221, 68 N. Y. Supp. 356 (1900). Where a town board refuses to audit a claim in full the appellate court has power to amend, upon hearing had upon the return to a writ of certiorari, the determination made by the town board, and to allow the claim of the contractor at the sum agreed to be paid by the highway commissioner. *People ex rel. Groton v. Town Board*, 92 Hun, 585, 36 N. Y. Supp. 1062 (1895).

**Matters made town charges.** The following are some of the special highway and bridge charges which may be audited under this section:

1. Compensation and expenses of town superintendents and their deputies. Highway Law, § 45.

2. Removal of obstructions caused by snow. *Idem*, § 47, subd. 2.

3. Inspection of highways to be constructed or improved as State or county highways. *Idem*, § 47, subd. 9.

4. Erection and repair of monuments marking the boundaries of highways. *Idem*, § 47, subd. 11.

5. Purchase, repair and storage of stone crushers, power rollers, traction engines, road machines, tools and implements. *Idem*, §§ 49, 90, 91, 92.

6. Purchase of gravel and stone. *Idem*, § 51.

7. Removal of obstructions, noxious weeds and brush, in the first instance. *Idem*, §§ 52, 54.

8. Purchase of wire fences to be used in place of fences causing the drifting of snow. *Idem*, § 56.

9. Damages for entry upon lands by town superintendent for opening ditches, etc. *Idem*, § 57.

10. Damages for change of grade. *Idem*, § 59.

11. Maintenance and repair of sidewalks. *Idem*, § 62.

12. Allowances for shade trees. *Idem*, § 63.

13. Setting out and preservation of shade trees. *Idem*, § 64.

14. Allowances for watering troughs. *Idem*, § 65.

15. Credit for repairs on private roads. *Idem*, § 66.

16. Erection and maintenance of guide boards. *Idem*, § 68.

17. Construction and repair of approaches to private lands, when authorized by town board. *Idem*, § 71.

18. Damages for injuries sustained by defects in highways and bridges. *Idem*, §§ 74, 76.

19. Expense incurred in closing highways for repair or construction. *Idem*, § 77.

20. Amount apportioned to town for construction of county highway. *Idem*, § 141.

21. Cost to town for maintenance of state and county highways. *Idem*, § 172.

22. Costs and damages awarded in proceedings to lay out, alter or discontinue highways. *Idem*, § 203.

23. Construction and repair of bridges. *Idem*, § 250.

24. Cost of constructing and maintaining bridges over boundary streams. *Idem*, § 254.

§ 107. **Reports of supervisor as to highway moneys.** — The supervisor shall present to the town board at its meeting held in each year, for considering the estimates contained in the statement of the town superintendent, as provided in section ninety-one, a verified report showing:

1. The moneys received from the state, as provided in section one hundred and one during the year ending October thirty-first.

2. The moneys received by him during such year on account of taxes levied and collected and from the issue and sale of bonds and certificates of indebtedness in anticipation of taxes, for highways, bridges, purchase and repair of machinery, tools and implements, the removal of obstructions caused by snow and for miscellaneous purposes.

3. The moneys received by him during such year as penalties recovered pursuant to this chapter, or from any other source and available for highway purposes in his town.

4. The expenditures during such year for the improvement, repair and maintenance of highways, for the maintenance and repair of bridges, for the construction of new bridges, for damages and charges in laying out, altering and discontinuing highways, for the removal of obstructions caused by snow, for the purchase of machinery, tools and implements, for the rental or hire of stone crushers, steam rollers and traction engines, for town superintendents' salary or compensation and audited expenses, for allowances as fees on account of receiving and disbursing highway moneys, or for other highway purposes.

5. All machinery, tools and implements owned in whole or in part by the town, the present value of each article thereof, and the estimated cost of all necessary repairs thereto, as shown by the annual inventory of the town superintendent.

The form of such report shall be prescribed by the commission. Such report shall be filed in the office of the town clerk within three days after the presentation thereof and shall be open to public inspection during the office hours of such town clerk and a duplicate shall at the same time be mailed to the commission. A certified copy of such report shall also be filed by the supervisor with



the clerk of the board of supervisors, who shall cause the same to be printed in the next issue of the annual proceedings of the board of supervisors. The town board shall cause a certified copy of the report to be published in a newspaper published in the town, or if there be none published therein, then in a newspaper published within the county and having the greatest circulation within the town. The expense of such publication, which shall not exceed ten dollars, shall be a town charge. The clerk of the board of supervisors shall transmit three copies of the journal of the proceedings of the board containing such report to the commission and three copies to the comptroller.

**Derivation.** This section is taken from former Highway Law, § 27, as added by L. 1906, chap. 363, and amended by L. 1907, chap. 719. The present law requires the report of many matters not provided for in the former law. Under the former law the highway commissioner was also required to file such report. Under the present law the town superintendent is relieved from this duty and the supervisor is alone required to make a financial report. This change was made for the reason that under the present law the supervisor is given the entire charge of highway finances and it was thought sufficient to require that he alone make the report. The present law also provides that the report be made to the town board and the commission and that it be filed with the town clerk and be open to public inspection during the office hours of that officer. The former law only required the report to be made to the State Engineer.

The report is to be presented at the meeting of the town board held on the Thursday succeeding general election day in each year. This is the annual audit meeting of the board in most towns. It is at this meeting that the estimate of the town superintendent is presented and considered. The result is that the town board at the time that it revises the town superintendent's estimate for the succeeding year has before it the report of the supervisor as to the expenditures of town moneys for highway purposes in the preceding year.

**Contents of report.** It is intended by this section to require the supervisor to give an account of the moneys received and expended by him for any purpose pertaining to the highways and bridges of his town. This report is intended to be supplemental to that required by subdivision 4 of section 80 of the Town Law, wherein he is required "on the Tuesday preceding the biennial town meeting and on the corresponding date in each alternate year to account with the justices of the peace and town clerk of the town for the disbursement of all moneys received by him."

**Inventory of machinery.** The town superintendent is required to make annually a written inventory of the machinery, tools and implements owned by the town, indicating each article and stating the value thereof and the estimated cost of necessary repairs, and to deliver the same to the supervisor on or before October 31, in each year. Section 49, *ante*. The supervisor is required, by subdivision 5 of the above section, to incorporate such inventory in his annual report.

The form of the report of the supervisor is to be prescribed by the commission, and blanks will be furnished for use of each supervisor, who will be required to use such blanks. See section 18, *ante*, p. 19. Such report may be in the following form.

**FORM No. 42.**

**Report of Supervisor as to Highway Moneys.**

To the Town Board of the Town of \_\_\_\_\_ :  
 John Allan, supervisor of the town of \_\_\_\_\_, county of \_\_\_\_\_, hereby submits the following report of money received and expended by him on account of highways and bridges in such town for the year ending October 31, 19\_\_\_\_, as required by section 107 of the Highway Law.

1. The amount received from the county treasurer of the county of \_\_\_\_\_, on account of State moneys apportioned to such town, pursuant to section 101 of the Highway Law was \_\_\_\_\_ dollars.

2. (a) The amount received from the collector of such town on account of taxes levied and collected for highways and bridges was \_\_\_\_\_ dollars.

(b) The amount received from the issue and sale of bonds pursuant to a proposition duly adopted at a regular [or special] town meeting of such town, held on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, for the purpose of [State purpose for which proposition was adopted] was \_\_\_\_\_ dollars.

(c) The amount received from the issue of certificates of indebtedness for money borrowed in anticipation of taxes to be levied and collected for [State purpose for which certificates were issued] was \_\_\_\_\_ dollars.

3. The following amounts were received upon the recovery of penalties and fines from the persons named and for the causes stated:

July 1. John Smith.....Throwing rubbish in highway.....\$10 00

4. The following expenditures have been made to the persons named and for the purposes stated, receipts for which are attached hereto:

DATE.	To whom paid.	Purposes for which made.	Amount.

5. The following is a complete inventory of all machinery, tools and implements owned by the town, the present value thereof, and the estimated cost of the necessary repairs thereto:

DESCRIPTION.	Present value.	Estimated cost of repairs.

6. The following is a summarized statement of the total amounts received and expended and balances remaining unexpended of the funds received by him for highway and bridge purposes:



tools and implements, the removal of obstructions caused by snow, and miscellaneous purposes, which shall be uniform, so far as practicable, throughout the state. Such commission may adopt forms and blanks for keeping such accounts. The commission shall also prescribe the form of order to be made by the town superintendent, upon the supervisor, and the form of the agreement to be entered into by the town board and town superintendent as provided in section one hundred and five. The town superintendent and supervisor shall keep their accounts in the method, and shall use the blanks and forms, prescribed by the commission. All orders and records of accounts shall be filed in the town clerk's office and preserved as a part of the town records.

**Derivation.** This section is taken from former Highway Law, § 28, as added by L. 1906, chap. 363, and amended by L. 1907, chap. 719.

**Blank forms and town accounts.** The commission is required to furnish blank forms of orders, reports and accounts and blank books whenever in their judgment they are required for the convenience of highway officers. Section 18, *ante*.

It is intended by this section to provide for a uniform system of keeping town highway accounts. The control of the accounts so far as form is concerned is in the commission. If the commission prescribes no form, or the form prescribed is not sufficient to meet the requirements of a particular case, the form may be deviated from. A failure to use a form prescribed by the commission will not affect the validity of a transaction, but any intentional disregard of these forms will probably not be overlooked by the commission.

§ 109. **Duty of town clerk.**— It shall be the duty of the town clerk, annually, between the fifteenth day of November, and the fifteenth day of December, to transmit to the commission a list containing the names of each supervisor, town superintendent, justice of the peace, town clerk, assessor and collector, showing his post office address, the date of his appointment or election and the expiration of his term of office.

**Derivation.** This section is new.

§ 110. **Compensation of supervisor and town clerk.**— The supervisor and town clerk of each town shall receive annually, as compensation for services under this chapter in lieu of all other compensation and fees, an amount to be fixed by the town board. Such compensation shall be a town charge.

**Derivation.** This section is new.

The compensation of the town superintendent is fixed by the town board, but shall not be less than two nor more than five dollars per day. Section 45, *ante*.

The compensation of supervisor and town clerk is provided for by section 178 of the Town Law and is fixed at two dollars for each day actually and necessarily devoted by them to the service of the town in the duties of their respective offices, when no fee is allowed by law for the services. A number of important duties are conferred upon the supervisor and town clerk by this chapter. The Legislature did not intend that they should perform these services gratuitously nor that they should have their per diem compensation for every occasional duty performed by them on each day. Under this section the town board may fix the compensation of the supervisor and town clerk for the services rendered under this chapter, which when so fixed shall be in lieu of all other compensation and fees. This provision supersedes that part of subdivision 3 of section 178 of the Town Law, which allows a payment to the supervisor of a fee of 1 per cent. on highway moneys disbursed by him as such supervisor.

§ 111. **Additional expenditure for improvement, repair and maintenance of town highways.**— Upon the written application of twenty-five taxpayers of a town, filed with the town clerk, the electors thereof may, at a regular or special town meeting, vote by ballot upon a proposition for the expenditure of a sum, not exceeding one-third of one per centum of the total taxable property of the town, including incorporated villages, in addition to the sum authorized by this chapter for the improvement, repair and maintenance of town highways in such town. Such proposition shall be submitted in the manner provided by law for the submission of questions or propositions at a town meeting. If such proposition be adopted, the amount specified therein shall be a town charge and shall be levied and collected in the same manner as other town moneys, and when collected shall be paid to the supervisor and expended for the purposes specified in such proposition as provided in this chapter.

**Derivation.** This section is new.

**Submission of proposition at town meeting.** Propositions are to be submitted for the purposes specified in this section in the manner provided by law for the submission of questions or propositions at a town meeting. Reference has already been made to the provisions of the Town Law which are applicable to the submission of town propositions in the notes to sections 92 and 95.

**The object of this section** is to authorize the raising of a special amount for the repair, improvement and maintenance of town highways. It permits of a submission to the vote of a town meeting of the question as to the amount which shall be expended each year upon the town highways, whenever it is thought desirable to make more extensive improvements than the town board and town superintendent have decided upon. This section permits a town meeting to control the amount to be expended where it seems that the town board has been too conservative in its estimates.

**ARTICLE VI.****State and County Highways.**

- Section 120. Highways to be constructed or improved by the state.
121. Construction or improvement of state highways.
122. Construction or improvement of county highways.
123. Preliminary resolution of board of supervisors.
124. Examination of county highway; approval or disapproval of commission.
125. Maps, plans, specifications and estimates.
126. Submission of maps, plans and specifications to district or county superintendent.
127. Action of commission in respect to maps, plans, specifications and estimates.
128. Final resolution of board of supervisors.
129. Order of construction of county highways.
130. Contracts for construction or improvement of highways.
131. Award of contracts to board of supervisors or town board.
132. Suspension of work under contract, completion by commission.
133. Acceptance of state highway when completed.
134. Acceptance of county highway.
135. Entry upon adjacent lands for drainage purposes.
136. Damages for entry.
137. State and county highways in villages.
138. Connecting highways in villages.
139. Resolution to provide for raising money.
140. Modifying method of payment.
141. Division of cost of county highways; payments by county treasurer.
142. County or town may borrow money.
143. Payments from state treasury.
144. Payment of cost of state highway.
145. Abolition of railroad grade crossings.
146. Street surface railroads on highways.
147. Where cost is assessable against abutting owners.
148. Acquisition of lands for right of way and other purposes.
149. Purchase of lands.
150. Petition to acquire lands.
151. Commissioners to be appointed.
152. Duties of commissioners.
153. County treasurer to pay award.
154. Costs; commissioners' fees.
155. Lands may be sold or leased; disposition of proceeds.
156. Provisions of labor law not applicable.
157. Highways and bridges on Indian reservations.

§ 120. Highways to be constructed or improved by the state.

— The highways which have been heretofore constructed or

improved under the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, which are included in the routes hereinafter described, together with such other highways as are constructed or improved by the commission in accordance with the routes set forth and described in this section, shall be state highways and shall be constructed or improved at the sole expense of the state as provided in this article. Such routes are hereby set forth and described as follows:

Route 1. Commencing at a point on the dividing line between Westchester county and New York, and running thence northerly through Mount Vernon to Eastchester road, thence northerly along Eastchester road, thence westerly in Eastchester to Post road, thence northerly along Post road to White Plains, thence southeasterly along Westchester avenue to Purchase street, thence northerly by Purchase street, by Rye lake and King street to state road, thence northerly by same to Armonk, thence easterly and northeasterly through the town of North Castle to Bedford village, thence northerly to Katonah, thence along the east side of the Croton river by Golden's bridge and Purdy's station to a point on the dividing line between Putnam and Westchester counties at or near Croton Falls, running thence northerly through the eastern portion of Putnam county by the way of Brewster, to a point on the dividing line between Dutchess and Putnam counties at or near Patterson, running thence northerly by the way of Pawling, Wingdale, Dover Plains, Amenia, to a point to be determined by the commission, on the dividing line between Columbia and Dutchess county, running thence northerly in Columbia county by the way of Copake to Chatham, thence northwesterly to a point at or near Valatie, running thence northerly to a point to be determined by the commission, on the dividing line between Rensselaer and Columbia counties, running thence northerly and northwesterly through the southwestern portion of Rensselaer county to a point to be determined by the commission on the Hudson river opposite or nearly opposite the city of Albany.

Route 2. Commencing at Jerome avenue on the dividing line between Westchester county and New York city and running thence northerly along Jerome avenue and Central Park avenue to Hartsdale, thence along the Sprain road and Landers road to Fair Grounds, thence northerly to cross road between Greenburgh, and Mount Pleasant, thence westerly along the same to the Saw Mill River road and the Tarrytown Lake road to Bedford road,

thence along the Sleepy Hollow road northerly and westerly to the Albany post road, thence northerly along Albany post road through Briar Cliff, Ossining and Croton Landing, thence along Old Yorktown road to Cornell Dam, thence along westerly side of Croton lake to Dixie Hill, thence northerly along Croton avenue to Crompound road, thence westerly along Crompound road through Peekskill to Albany post road, thence northerly from Peekskill, to a point to be determined by the commission, on the dividing line between the towns of Phillipsburg, Putnam county, and Cortlandt, Westchester county, running thence northerly through the western portion of Putnam county to a point to be determined by the commission, on the dividing line between Dutchess and Putnam counties, running thence northerly by the way of the city of Poughkeepsie and Rhinebeck, to a point to be determined by the commission, on the dividing line between Columbia and Dutchess counties, running thence northerly, northeasterly and northwesterly by the way of Claverack, to the city of Hudson, running thence northeasterly from the city of Hudson to a point at or near Valatie, connecting with route number one, as above described.

Route 3. Commencing at a point to be determined by the commission, on the dividing line between the towns of Orangetown, Rockland county, and the state of New Jersey, running thence northerly through the eastern portion of Rockland county by the way of points at or near Nyack and Haverstraw, to a point to be determined by the commission, on the dividing line between Orange and Rockland counties, running thence northerly through the eastern portion of Orange county to the city of Newburg, thence northerly from the city of Newburg to a point to be determined by the commission, on the dividing line between Ulster and Orange counties, running thence northerly through the eastern portion of Ulster county to the city of Kingston, running thence northerly from the city of Kingston to a point to be determined by the commission, on the dividing line between Greene and Ulster counties, running thence northerly through the eastern portion of Greene county to points at or near Catskill, Athens and Coxsackie, to a point to be determined by the commission, on the dividing line between Albany and Greene counties, running thence northerly to the city of Albany.

Route 4. Commencing at a point to be determined by the commission on route number three, running thence through Orange county by the way of Middletown to a point to be determined by



the commission, on the dividing line between Sullivan and Orange counties, running thence westerly and northerly through Sullivan county by the way of the Monticello to a point to be determined by the commission, on the dividing line between Delaware and Sullivan counties, thence to Deposit, on the dividing line between Broome and Delaware counties, running thence westerly by the way of Windsor to the city of Binghamton, running thence westerly from the city of Binghamton by the way of Lestershire and Endicott, to a point to be determined by the commission, on the dividing line between Tioga and Broome counties, running thence westerly through the southern portion of Tioga county, to a point to be determined by the commission, on the dividing line between Chemung and Tioga counties, running thence westerly and northwesterly through the southern portion of Chemung county, to the city of Elmira, running thence northerly from the city of Elmira to a point at or near Horseheads, running thence westerly to a point to be determined by the commission on the dividing line between Steuben and Chemung counties, running thence westerly and northwesterly by the way of Corning, Addison, and Canisteo, to the city of Hornell, running thence northwesterly and southwesterly from the city of Hornell to a point at or near Almond on the dividing line between Allegany and Steuben counties, running thence southwesterly to Wellsville, running thence northwesterly and westerly by the way of Belmont, Belvidere and Friendship and Cuba, to a point to be determined by the commission on the dividing line between Cattaraugus and Allegany counties, running thence southwesterly to the city of Olean, running thence westerly and northwesterly from the city of Olean by the way of Salamanca, to a point to be determined by the commission, on the dividing line between Chautauqua and Cattaraugus counties, running thence westerly to the city of Jamestown, thence northwesterly by the way of Mayville, to Westfield.

Route 5. Commencing at the city of Kingston, running thence northwesterly by the way of West Hurley, Shokan and Pine Hill, to a point to be determined by the commission, on the dividing line between Delaware and Ulster counties, running thence westerly to Margaretville, running thence northerly by the way of Roxbury to Grand Gorge, running thence northwesterly to a point to be determined by the commission, on the dividing line between Schoharie and Delaware counties, running thence northwesterly

and westerly to a point to be determined by the commission, on the dividing line between Delaware and Schoharie counties, running thence northwesterly and westerly by the way of Harpersfield, North Kortright and Davenport, to a point to be determined by the commission, on the dividing line between Otsego and Delaware counties, running thence to Oneonta, Otsego county, running thence northeasterly along route number seven to Colliers; running thence northerly in Otsego county by the way of Coopers-town and Richfield Springs to a point to be determined by the commission, on the dividing line between Herkimer and Otsego counties; running thence northerly to Herkimer connecting with route number six.

Route 6. Commencing at a point to be determined by the commission at the city of Albany, running thence northwesterly to a point to be determined by the commission, on the dividing line between Schenectady and Albany counties, running thence northwesterly to the city of Schenectady, running thence northwesterly from the city of Schenectady to a point to be determined by the commission, on the dividing line between Montgomery and Schenectady counties, running thence westerly and northwesterly through Montgomery county by the way of Fonda and St. Johnsville, to a point at or near East Creek, on the dividing line between Herkimer and Montgomery counties, running thence westerly and northwesterly by the way of Little Falls and Herkimer, to a point to be determined by the commission, on the dividing line between Herkimer and Oneida counties, running thence westerly to the city of Utica, running thence westerly from the city of Utica to Oneida, on the dividing line between Madison and Oneida counties, running thence westerly by the way of Chittenango, to a point to be determined by the commission on the dividing line between Onondaga and Madison counties, running thence westerly by the way of Fayetteville, to the city of Syracuse, running thence from the city of Syracuse by the way of Camillus and Elbridge, to a point to be determined by the commission, on the dividing line between Cayuga and Onondaga counties, running thence southwestly to the city of Auburn, running thence from the city of Auburn to a point to be determined by the commission on the dividing line between Seneca and Cayuga counties, running thence westerly to Seneca Falls, thence southerly through the village of Seneca Falls to the south side of Seneca lake outlet, thence westerly on the south side of Seneca

lake outlet to a point at the foot of Seneca lake, running thence westerly to a point to be determined by the commission on the dividing line between Ontario and Seneca counties, running thence westerly to Geneva, running thence westerly from Geneva to Canandaigua, running thence westerly to a point to be determined by the commission, on the dividing line between Livingston and Ontario counties, running thence westerly by the way of Avon and Caledonia, to a point to be determined by the commission, on the dividing line between Genesee and Livingston counties, running thence westerly by the way of Batavia, to a point to be determined by the commission, on the dividing line between Erie and Genesee counties, running thence westerly to the city of Buffalo, Erie county.

Route 7. Commencing at a point to be determined by the commission on the dividing line between the town of Binghamton in Broome county and Pennsylvania, running thence northerly to the city of Binghamton; running thence northerly and northeasterly from the city of Binghamton on the east side of the Chenango river, by the way of Port Crane, Sanitaria Springs and Harpursville, to Nineveh, on the dividing line between Chenango and Broome counties, running thence northeasterly along the Susquehanna valley, to a point at or near Sidney, on the dividing line between Chenango and Delaware counties, running thence northeasterly by the way of Sidney to a point to be determined by the commission, on the dividing line between Otsego and Delaware counties, running thence northeasterly along the Susquehanna valley to Oneonta, running thence northeasterly from Oneonta by the way of Maryland and Worcester, to a point to be determined by the commission, on the dividing line between Schoharie and Otsego counties, running thence easterly by the way of Cobleskill to a point to be determined by the commission, on the dividing line between Albany and Schoharie counties at or near West Berne, running thence easterly to the city of Albany.

Route 8. Commencing at the city of Binghamton, running thence northerly on the west side of the Chenango river to Chenango Forks, on the dividing line between Chenango and Broome counties, running thence along the west bank of the Chenango river to North Norwich, running thence northerly by the way of Sherburne to Earlville, on the dividing line between Madison and Chenango counties, running thence northerly by the way of

Hamilton and Bouckville, to a point at or near Oriskany Falls, on the dividing line between Oneida and Madison counties, running thence northeasterly by the way of Deansboro to a point to be determined by the commission connecting with route number six.

Route 9. Commencing at a point to be determined by the commission, at or near Horseheads, Chemung county, New York, on route number four, running thence northerly and northeasterly by the way of Horseheads, Breesport and Erin to a point to be determined by the commission on the dividing line between Tioga and Chemung counties, running thence easterly and northeasterly by the way of North Spencer to a point to be determined by the commission on the dividing line between Tompkins and Tioga counties, running thence northerly to the city of Ithaca, running thence northeasterly by the way of a point to be determined by the commission at or near Dryden to a point to be determined by the commission on the dividing line between Cortland and Tompkins counties, running thence northeasterly to Cortland, thence northeasterly by the way of Truxton to a point to be determined by the commission on the dividing line between Madison and Cortland counties at or near De Ruyter, thence northerly to Cazenovia, thence easterly by the way of Morrisville to a point at or near Bouckville on route number eight.

Route 10. Beginning at the city of Syracuse, running thence southerly to a point to be determined by the commission on the dividing line between Cortland and Onondaga counties, running thence southerly by the way of Homer to Cortland, thence southeasterly by the way of McGrawville, Solon and Willett to a point to be determined by the commission on the dividing line between Chenango and Cortland counties, thence southeasterly by the way of Smithville Flats to Greene, thence easterly by the way of Coventry to Coventryville, thence southeasterly to Afton, connecting with route number seven.

Route 11. Commencing at the city of Ithaca, running thence northerly to a point to be determined by the commission, on the dividing line between Cayuga and Tompkins counties, running thence northerly to the city of Auburn.

Route 12. Commencing at a point at or near Horseheads, at a point to be determined by the commission, running thence northerly to a point to be determined by the commission, on the dividing line between Schuyler and Chemung counties, running thence

northerly by the way of Watkins, to a point to be determined by the commission, on the dividing line between Yates and Schuyler counties, running thence northwesterly by the way of Dundee, to the village of Penn Yan, running thence northerly to a point on the dividing line between Ontario and Yates counties, running thence northerly to the city of Geneva, running thence northerly from the city of Geneva, to a point to be determined by the commission, on the dividing line between Wayne and Ontario counties, running thence northerly to Lyons, connecting with route number twenty.

Route 13. Commencing at Bath, Steuben county, running thence northeasterly by the way of Hammondsport to a point to be determined by the commission on the dividing line between Schuyler and Steuben counties, thence northeasterly to a point to be determined by the commission on the dividing line between Yates and Schuyler counties, thence northeasterly to Dundee on route number twelve.

Route 14. Commencing at Corning, Steuben county, running thence northwesterly by the way of Bath, Avoca to Cohocton, running thence northerly from Cohocton, to a point to be determined by the commission on the dividing line between Ontario and Steuben counties, running thence northeasterly to Naples, running thence northerly from Naples to a point to be determined by the commission, connecting with route number six, running thence along route number six, to Holcomb; running thence northwesterly to a point to be determined by the commission on the dividing line between Monroe and Ontario counties, thence northerly to Pittsford, thence westerly, then northerly to the city of Rochester.

Route 15. Commencing at Hornell, Steuben county, running thence northwesterly to a point to be determined by the commission, on the dividing line between Allegany and Steuben counties, running thence northerly to a point to be determined by the commission, on the dividing line between Livingston and Allegany counties, running thence northerly by the way of Dansville and Mount Morris, thence northwesterly and northerly by the way of Moscow and York to a point on route number six at or near Caledonia.

Route 16. Commencing at the village of Cuba, Allegany county, running thence northeasterly by the way of Belfast and Caneadea, to a point to be determined by the commission, on the

dividing line between Wyoming and Allegany counties, running thence northerly by the way of Pike, Gainsville and Rock Glen to Warsaw, running thence northerly to a point to be determined by the commission, on the dividing line between Genesee and Wyoming counties, running thence northerly to the village of Le Roy, running thence along route number six to Caledonia, running thence northerly to a point to be determined by the commission on the dividing line between Monroe and Livingston counties, running thence northerly by the way of Scottsville to the city of Rochester.

Route 17. Commencing at a point to be determined by the commission on route number four at or near Hinsdale, running thence northerly by the way of Franklinville and Machias to a point to be determined by the commission near the dividing lines of Erie, Wyoming and Cattaraugus counties, running thence northwesterly by the way of East Aurora to the city of Buffalo.

Route 18. Commencing at a point to be determined by the commission, on the dividing line between Ripley, Chautauqua county, and the state of Pennsylvania, running thence northeasterly by the way of Westfield, Brocton, Fredonia, along the old Buffalo and Erie road, to a point to be determined by the commission, on the dividing line between Erie and Chautauqua counties, running thence northeasterly and northerly to the city of Buffalo, running thence northerly from the city of Buffalo to the city of Tonawanda, running thence northwesterly and westerly from North Tonawanda to the city of Niagara Falls, running thence northerly from Niagara Falls by the way of Lewiston to a point near the mouth of the Niagara river, Niagara county.

Route 19. Commencing at the city of Buffalo, running thence easterly to Marilla, thence southerly to Wales Center, thence easterly to a point to be determined by the commission on the dividing line between Wyoming and Erie counties, running thence easterly to Varysburg, thence northerly by the way of Attica to a point to be determined by the commission on the dividing line between Genesee and Wyoming counties, running thence northeasterly to Batavia, Genesee county, connecting with route number six.

Route 20. Commencing at a point on route number six, at or near Elbridge, in Onondaga county, running thence northerly to Jordan and westerly to a point to be determined by the commission, on the dividing line between Cayuga and Onondaga counties, running thence northwesterly and southwesterly by the way of Port Byron and Montezuma, to a point to be determined

by the commission, at or near the dividing lines between Wayne, Seneca and Cayuga counties, running thence northwesterly and westerly from Savannah, Clyde, Lyons, Palmyra, and Macedon to a point to be determined by the commission, on the dividing line between Monroe and Wayne counties, running thence northwesterly to the city of Rochester, Monroe county.

Route 21. Commencing at a point on the Hudson river at or near Albany and running thence easterly to a point at or near Sand Lake, running thence southerly to a point at or near Nassau, in Rensselaer county, running thence southeasterly to a point to be determined by the commission, on the dividing line between Columbia and Rensselaer counties, to a point to be determined by the commission, on the dividing line between Columbia county and the state of Massachusetts.

Route 22. Commencing at a point in Rensselaer county at or near the city of Troy, running thence northeasterly by the way of Raymertown, to Potter Hill, running thence northerly through Hoosick Falls, to a point at or near Eagle Bridge, on the dividing line between Washington and Rensselaer counties, running thence northerly by the way of Cambridge, Salem and Granville by the way of Whitehall and the shore road along Lake Champlain to Putnam; and commencing at a point on route twenty-five at Riparius in Warren county, and running thence to a point to be determined by the commission on the dividing line between Essex and Warren counties, and running thence northerly by way of Schroon Lake village to Elizabethtown, running thence westerly to Keene, thence northerly to Ausable Forks and a point on the dividing line between Clinton and Essex counties, thence northeasterly to a point at or near Ausable Chasm, thence northerly by the way of Plattsburgh and Chazy to Rouses Point.

Route 23. Commencing at the village of Ilion, running thence southwesterly to a point at or near the intersection of the three counties, Otsego, Oneida and Herkimer, running thence westerly in Otsego county to a point to be determined by the commission on the dividing line between Oneida and Otsego counties, running thence northerly to the city of Utica, running thence northeasterly through the town of Deerfield to a point to be determined by the commission on the dividing line between Herkimer and Oneida counties, thence easterly to the village of Norway.

Route 24. Commencing at a point on route number six at Fonda, Montgomery county, running thence northerly to a point to be determined by the commission on the dividing line between

Fulton and Montgomery counties, running thence northerly by the way of Johnstown and Gloversville to Northville, running thence northerly to a point to be determined by the commission on the dividing line between the counties of Hamilton and Fulton, running thence northerly to Lake Pleasant.

Route 25. Commencing at Whitesboro near Utica on route number twenty-eight in Oneida county, running thence northerly, by the way of Marcy, Holland Patent, Remsen, Alder Creek and White Lake Corners, to a point to be determined by the commission, at or near the dividing lines between Herkimer, Lewis and Oneida counties, running thence northeasterly by the way of Fulton Chain, and on or near the highways laid out, to a point to be determined by the commission, on the dividing line between Hamilton and Herkimer counties, running thence easterly by the way of Raquette Lake, and on the south shore of Raquette Lake, running thence northeasterly to Blue Mountain Lake, running thence northerly to Long Lake, running thence easterly to a point to be determined by the commission, on the dividing line between Essex and Hamilton counties, running thence easterly to Newcomb, running thence southeasterly by the way of Minerva, to a point to be determined by the commission, on the dividing line between Warren and Essex counties, running thence by the way of North Creek, Riparius and Warrensburg to Lake George, running thence southerly to a point to be determined by the commission on the dividing line between Saratoga and Warren counties at or near Glens Falls, running thence southerly by the way of Saratoga Springs to Ballston Spa, running thence southeasterly to a point to be determined by the commission on the dividing line between Albany and Saratoga counties, running thence southerly to a point to be determined by the commission at or near the city of Albany.

Route 26. Commencing at Little Falls, running thence by the way of Manheim Corners, Dolgeville and Salisbury Center to Fairfield, running thence northwesterly to a point to be determined by the commission, at or near Prospect, on the dividing line between Oneida and Herkimer counties, running thence northwesterly to a point to be determined by the commission, connecting with route number twenty-five.

Route 27. Commencing at a point on route number twenty-five, to be determined by the commission near Alder Creek, running thence northwesterly by the way of Booneville, to a point on the dividing line between Lewis and Oneida counties, running thence



northerly by the way of Lowville, to a point at or near Carthage, on the dividing line between Jefferson and Lewis counties, running thence northwesterly and westerly to the city of Watertown, running thence northwesterly from the city of Watertown to Clayton, thence northeasterly to Alexandria Bay, Jefferson county.

Route 28. Commencing at the city of Utica, Oneida county, running thence northwesterly to Rome, running thence northwesterly from Rome, by the way of Camden, to a point to be determined by the commission, on the dividing line between Oswego and Oneida counties, running thence northwesterly by the way of Parish to Union Square, Oswego county.

Route 29. Commencing at Rome, running thence southwestwesterly to Oneida, being a point on the dividing line between Madison and Oneida counties.

Route 30. Commencing at Rouses Point, in Clinton county, running thence westerly through the northern part of Clinton county, to a point to be determined by the commission, on the dividing line between Franklin and Clinton counties, running thence westerly by the way of Burke, Malone and Moira, to a point to be determined by the commission, on the dividing line between Saint Lawrence and Franklin counties, running thence westerly to North Lawrence, running thence southerly to a point at or near Nicholville, running thence westerly and southwestwesterly by the way of Potsdam, Canton and Gouverneur, to a point to be determined by the commission, on the dividing line between Jefferson and Saint Lawrence counties, running thence southwestwesterly by the way of Philadelphia to Watertown, running thence southerly from Watertown, by the way of Adams and Pierrepont Manor, to a point to be determined by the commission, on the dividing line between Oswego and Jefferson counties, running thence southerly and southwestwesterly and westerly by the way of Pulaski and Union Square to Oswego, running thence westerly from Oswego to a point to be determined by the commission, on the dividing line between Cayuga and Oswego counties, running thence southwestwesterly through the northern part of Cayuga county to a point to be determined by the commission, on the dividing line between Wayne and Cayuga counties, running thence southwestwesterly and westerly by the way of Red Creek, Walcott, Alton, Sodus, Williamson and Ontario to a point to be determined by the commission on the dividing line between Monroe and Wayne counties, running thence southwestwesterly to the city of Rochester, running thence westerly from the city of Rochester by the way of Spencer-

port, to a point to be determined by the commission, on the dividing line between Orleans and Monroe counties, running thence westerly to points at or near Albion and Medina, to a point to be determined by the commission, on the dividing line between Niagara and Orleans counties, running thence westerly to a point to be determined by the commission, connecting with route number eighteen.

Route 31. Commencing at Malone, Franklin county, running thence southerly by the way of a point at or near Duane and Meacham Lake to Saranac Junction.

Route 32. Commencing at North Lawrence in St. Lawrence county, running thence westerly to Winthrop, running thence northerly to Massena, running thence southwesterly by the way of Waddington to Ogdensburg.

Route 33. Commencing at Syracuse, running thence northerly to a point to be determined by the commission, on the dividing line between Oswego and Onondaga counties, running thence northerly by the way of Central Square to a point at or near Colosse on route number twenty-eight.

Route 34. Commencing at the city of Oswego on the east side of the river, running thence by the way of Fulton through Phoenix to a point to be determined by the commission on the dividing line between Onondaga and Oswego counties, running thence by the way of Liverpool to Syracuse.

Route 35. Commencing at a point to be determined by the commission on the dividing line between Nassau and Queens counties, running thence easterly through the northern portion of Nassau county to a point to be determined by the commission on the dividing line between Suffolk and Nassau counties, running thence easterly by the way of Jericho turnpike to Smithtown branch, Saint James, Port Jefferson and Wading River to Riverhead, running thence southerly to West Hampton, running thence westerly by the way of south country road to Patchogue, Sayville, Islip, Bay Shore and Babylon to Amityville, running thence westerly to a point to be determined by the commission on the dividing line between Nassau and Suffolk counties, running thence westerly through the southern portion of Nassau county to a point to be determined by the commission on the dividing line between Queens and Nassau counties.

Route 36. Commencing at Owego in Tioga county, running thence northerly to a point to be determined by the commission on the dividing line between Tompkins and Tioga counties, running thence northwesterly to the city of Ithaca, running thence

northwesterly from the city of Ithaca to Trumansburg, at or near the dividing line between Seneca and Tompkins counties, running thence northwesterly and northerly by the way of Ovid to a point to be determined by the commission on route number six.

Route 37. Commencing at Johnstown in Fulton county, running thence northeasterly by the way of Broadalbin to a point to be determined by the commission on the dividing line between Saratoga and Fulton counties, running thence easterly by the way of Galway to Saratoga Springs connecting with route number twenty-five.

**State highways.** Section 3 of this law classifies highways and describes State highways as "those constructed or improved under this chapter at the sole expense of the State, including those highways specified and described in section 320 of this chapter." Such highways may include not only those specified in this section which have not yet been constructed or improved, but also included within the routes specified, which have been heretofore constructed or improved under the provisions of chapter 115 of the Laws of 1898, the so-called Higbie-Armstrong Act.

**Description of routes.** The foregoing routes are outlined and described for the purpose of indicating in a general way the several counties through which they are to run and the different towns, villages and cities which are to be reached. It was not the intention of the Legislature to definitely and exactly describe the distances and directions which these routes were to take. The commission is to control the exact location of the routes and all that is required by the statute is that the points mentioned shall be touched by general observation of the directions indicated.

As stated by Senator Allds, chairman of the joint committee which reported this scheme to the Legislature: "If the highways outlined are of sufficient importance to be deemed through 'state highways,' it follows that when constructed they should also be maintained by the State. We have, therefore, set forth a proposed plan of through routes comprising in the aggregate 3,332 miles of which total mileage 560 miles have already been improved or are in the process of construction. In the selection of the respective routes your committee has been governed by the general plan outlined on the map adopted last year, but we have been careful so to phrase the description in the proposed statute that, while it shall express the legislative judgment as to what routes are of sufficient importance for through connection to be entitled to be denominated as State roads and to be built and maintained by the State, a reasonable latitude is left to the discretion of the Department so long as the result of connecting the cities of the State and building main routes is accomplished by the specific route selected by the Department. To illustrate, one main route runs from Albany through to Buffalo and yet there is no attempt to fix by statute the question of which side of the Mohawk river should be followed when the commission designate and lay out the specific roads which are to be improved."

§ 121. Construction or improvement of state highways.—The state highways shall be constructed or improved by the commis-

sion as provided in this article. The mileage to be constructed from the amount available from the sale of bonds issued as provided by chapter four hundred and sixty-nine of the laws of nineteen hundred and six, as amended by chapter seven hundred and eighteen of the laws of nineteen hundred and seven, and appropriated for the construction or improvement of state highways, shall be equitably apportioned by the commission among the several counties without discrimination; but not more than one-half of the amount appropriated each year from the proceeds of the sale of such bonds shall be expended under this article for the construction and improvement of state highways. In making the apportionment between counties the commission shall take into consideration the mileage which may be constructed from the amount to be expended under this article in each county for the construction or improvement of county highways, together with the mileage of state and county highways theretofore constructed out of moneys derived from the sale of bonds issued as above provided.

**Derivation.** This section is new.

**Object of section.** Under the former law there were no highways constructed or maintained at the sole expense of the State. Those highways described in the routes contained in the preceding section become State highways and the commission and its officers are to assume the entire responsibility for the construction and maintenance thereof. The provisions of this article relating to contracts and the work of construction apply alike to State and county highways. Town and county officers have no control over the construction of State highways, unless directed as provided by law by the commission.

**Available funds for improvement of highways.** Section 12 of article 7 of the Constitution provides as follows: "A debt or debts of the State may be authorized by law for the improvement of highways. Such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties. The aggregate of the debts authorized by this section shall not at any one time exceed the sum of fifty million dollars. The payment of the annual interest on such debt and the creation of a sinking fund of at least two per centum per annum to discharge the principal at maturity shall be provided by general laws whose force and effect shall not be diminished during the existence of any debt created thereunder. The Legislature may by general laws require the county or town or both to pay to the sinking fund the proportionate part of the cost of any such highway within the boundaries of such county or town and the proportionate part of the interest thereon, but no county shall at any time for any highway be required to pay more than thirty-five hundredths of the cost of such highway, and no town more than fifteen hundredths. None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways thereby authorized."

Of the amount to be expended each year from the proceeds of bonds sold under authority conferred by this section of the Constitution, it is provided by the above section of the statute that not more than one-half of the amount available shall be expended each year for the construction and improvement of State highways. It is intended by this provision to restrict the commission in the expenditure of moneys for the construction of State and county highways, so that the State system will not be developed at the expense of the county system. Both systems will, under the present law, be developed in an equal degree.

**Equitable apportionment.** The above section of the Constitution contains the following provision: "Such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties." This provision requires an equitable apportionment of those highways which are to be constructed from the proceeds of bonds sold by the State for the improvement of highways among the several counties. Such apportionment is apparently to be based upon highway mileage rather than upon the cost of construction. The designation of the routes specified in section 120 is a legislative declaration of the importance of constructing such highways in the several counties and is a definite determination of their character. These routes are to be considered by the commission in determining the equitable apportionment of the highways to be constructed from the proceeds of the bonds issued by the State for the construction of highways. If a county is assigned more than its just share of mileage of State highways by the routes described then the commission may make a proportionate deduction in the mileage of county highways to be constructed within the county. The mileage of the routes described as State highways within each county will then necessarily have a bearing upon the equitable apportionment to be made by the commission of county highways to be constructed within the county.

The commission in constructing State highways is to be guided by equity in determining the number of miles which are to be constructed within a certain reasonable period of time. The statute does not compel the commission to equitably distribute each year among the counties the amount set apart for State highways. Any fixed and definite scheme which will involve an ultimate equitable apportionment of the mileage of the State system throughout the counties will probably be deemed sufficient. It is apparent, under the law, that the commission is given a wide discretion in determining what constitutes an equitable apportionment. It will be presumed that the scheme adopted by them is equitable and without discrimination as between the counties. Unfairness of course may be shown and when shown will nullify the commission's acts; but the evidence adduced must be sufficient to overcome the presumption existing in favor of the validity of the commission's determination.

§ 122. **Construction or improvement of county highways.**—The county highways to be constructed or improved under this article at the joint expense of the state, county and town, shall be those highways in each county determined by the commission to be of sufficient public importance to come within the purposes of this

chapter, so as to constitute a part of a properly developed system of improved market roads within the county, taking into account the use, location and value of such highways for the purposes of common traffic and travel. Such county highways shall be equitably apportioned by the commission among the several counties without discrimination. In making such apportionment the commission shall take into consideration the total mileage of state highways which shall be hereafter constructed or improved in each county, and also the highways therein which have been constructed or improved prior to the taking effect of this article from funds made available by the issue and sale of bonds as provided in section twelve of article seven of the constitution, so that there shall be an equitable distribution as between the counties of all highways built in whole or in part from such funds.

**Derivation.** The language used in this section describing the character of the highways to be constructed or improved as county highways is similar to that contained in L. 1898, chap. 115, § 3, as amended by L. 1907, chap. 717.

**Selection of county highways.** Under section 3, *ante*, county highways are described as "those heretofore or hereafter constructed or improved at the joint expense of State, county and town, as provided by law, except those highways specified and described in section 120 of this chapter." Those highways which have been constructed under the so-called Highbie-Armstrong Act, as amended, which are not described as State highways in such section 120, come within the class known as county highways. After a highway is constructed or improved at the joint expense of the State and county as provided in this article, it is a county highway; until the completion of such construction or improvement it remains in the class of town highways. The above section authorizes the commission to determine what town highways are of sufficient importance to be constructed or improved at the joint expense of the State, county and town. In making this determination the commission is to be governed by the public importance of the highway and as to whether it should be constructed or improved for the purpose of promoting the development of a State system of improved market roads within the county. It should be observed however that the commission is limited in its determination by the provisions of section 315, relating to county highway maps. The term "market road" is general in its meaning and of little value in defining the power of selection conferred upon the commission. It is not every road leading from the farm to the market that may be selected by the commission for construction or improvement. The highways selected must be so located as to be of use and value "for the purpose of common traffic and travel." Such a highway should be one used by a considerable number of persons residing upon it or upon highways leading into it, for the purpose of reaching a place where farm products are commonly marketed. The commission is granted by the statute a wide discretion in determining what highways shall be improved. They are subjected by the statute to very general limitations and unless it be clearly shown that the intent of the

statute is being transgressed they will not be interfered with in the exercise of this discretion.

**Apportionment among the counties.** The statute requires the county highways to be equitably apportioned by the commission among the several counties without discrimination. This apportionment must be based upon mileage, as in the case of the apportionment of State highways.

The joint highway committee, of which Senator J. P. Allds was chairman, in its note to this section makes the following statement: "Article 7, section 12, of the constitution, which authorizes the creation of a debt not exceeding fifty million dollars for the improvement of highways provides that 'such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties.' It is assumed in this section that the commission in apportioning county highways among the counties will take into consideration those highways which are declared by this chapter to be State highways to be improved at the sole expense of the state. The evident purpose of the constitution was to provide for an equitable apportionment of the highways among the counties whether they be constructed or improved by the state, or jointly by the state, county and town. An equitable apportionment of the highways to be constructed from the proceeds of the bonds issued under the constitutional provision must necessarily include both state and county highways. The commission in exercising the authority conferred upon it by this section will be governed both by the statute and the constitution."

§ 123. **Preliminary resolution of board of supervisors.**—The board of supervisors of any county may pass a resolution stating that public interest demands the improvement of a highway or section thereof within the county, and requesting that it be constructed or improved as provided in this article. Such resolution shall contain a description of such highway or section thereof. Such highway or section thereof shall not include a portion of a highway within a city, nor any portion of a highway within an incorporated village, unless it be necessary to complete the connection of such highway with a highway already improved or to be improved under this article. The clerk of the board of supervisors shall, within ten days after the passage of such a resolution, transmit a certified copy thereof to the commission.

**Derivation.** This section is taken from L. 1898, chap. 115, § 10, as amended by L. 1907, chap. 717. The important change relates to the construction of connecting highways through villages and cities. Under the former law it was provided that the highway to be improved "shall not include any portion of a highway within the boundary of any city or incorporated village, except that portion of the cities of Rome and Oneida lying outside of the respective tax districts of said cities and except as provided in section 15 of this act." Section 15 of the act authorizes the construction of a section of a highway not exceeding one mile in length for the purpose of connecting highways or sections thereof which were already constructed under that act.

**Highways in villages.** A county highway may be constructed through a village in the same manner as outside thereof, "unless the street through which it runs has, in the opinion of the commission, been so improved or paved as to form a continuous and improved highway of sufficient permanence as not to warrant its reconstruction, in which case such highway shall be constructed or improved to the place where such paved or improved street begins." See § 137, *post*. There is an apparent conflict between this provision and that of the above section providing that the highway described in the resolution of the board of supervisors shall not include "any portion of a highway within an incorporated village, unless it be necessary to complete the connection of such highway with a highway already improved or to be improved under this article." But these two provisions should be so construed as to carry into effect the evident intent of the Legislature. This intent contemplated the construction of a county highway within the limits of an incorporated village when necessary to complete a continuous and improved highway from any point within the village where a street has been improved or paved. If a county highway is to be constructed within a village, the cost thereof will be a joint charge against the town, county and state, and it would therefor seem appropriate to include the portion within the village in the preliminary resolution.

**Connecting highways.** This section authorizes the board of supervisors to include in the resolution the description of a portion of a highway to be constructed within a city or village where such construction is necessary to complete the connection of such highway with a highway already improved or to be improved under this article. It is also provided in section 138 that the board of supervisors may petition by resolution for the construction or improvement of a highway to connect streets or highways within a village "with county highways which have been heretofore built under the provisions of § 115 of the laws of 1898 and the acts amendatory thereof."

**Resolution of board of supervisors; form and contents; publication.** The provisions of section 17 of the County Law, relating to the form, contents, adoption and publication of boards of supervisors are applicable to resolutions adopted under this section for the construction of a county highway. Such section is as follows: "Every act or resolution of the board shall require for its passage the assent of a majority of the supervisors elected, unless otherwise required by law. Every act or resolution of such board in the exercise of its legislative powers shall have a title prefixed, concisely expressing its contents, followed by a reference to the law or laws conferring the authority to pass the act or resolution, the number of votes, both for and against its passage, and, when the assent of any supervisor is required, that such assent was given; and all acts or resolutions so passed shall be numbered in the order of their passage, and certified by the chairman and clerk, and within six weeks after the close of each session, published in the newspapers in the county appointed to publish the session laws of the legislature."

**Forms of resolution.** Blank forms of resolutions to be adopted by the board of supervisors will probably be furnished by the commission upon its organization. The preliminary resolution used under the former law may be used with such modifications as are required by the new law. The following form will be found useful.



FORM No. 43.

Preliminary Resolution for Construction of County Highway.

*Resolution* as to construction or improvement of a county highway in town [or towns] of \_\_\_\_\_, as provided in article six of the Highway Law.

*Passed* by the board of supervisors of \_\_\_\_\_ county, pursuant to section 123 of the Highway Law, at a meeting of such board held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, a quorum being present \_\_\_\_\_ supervisors voting against the same:

*Whereas* public interest demands the construction or improvement of the highway hereinafter described as a county highway, therefore be it

*Resolved* that the said board of supervisors request that the following described highway be constructed or improved as a county highway, as provided in article six of the Highway Law, to wit: The highway [or, the section of the highway], located in the town [or towns], of \_\_\_\_\_ beginning at [describe highway or section thereof] being a distance of about \_\_\_\_\_ miles.

*Resolved*, That the clerk of this board is hereby directed to forthwith transmit a certified copy of the foregoing resolution to the State Commission of Highways.

STATE OF NEW YORK, }  
 .....County. } ss.:

This is to certify that I, \_\_\_\_\_, clerk of the board of supervisors of the said county of \_\_\_\_\_, have compared the foregoing copy of resolution with the original resolution now on file in the office, and which was passed by the board of supervisors of said county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and that the same is a correct and true transcript of such original resolution and the whole thereof.

In witness whereof, I have hereunto set my hand and the official seal of the board of supervisors, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

.....

*Clerk of the Board of Supervisors of the county of*

§ 124. Examination of county highway; approval or disapproval by commission.— The commission after receipt of such resolution, and at such times as it deems proper, shall examine the highway or section thereof sought to be constructed or improved, and shall determine whether it is of the character specified in section one hundred and twenty-two, and whether the construction or improvement thereof will provide for an equitable apportionment of the highways among the several counties as provided in such section. After such examination the commission shall certify its approval or disapproval of such resolution to the board of super-

visors adopting it; if it disapprove thereof it shall certify its reasons therefor.

**Derivation.** This section is taken from L. 1898, chap. 115, § 3, as amended by L. 1907, chap. 717.

**Examination by the commission.** The commission, in making the examination preliminary to its approval of the resolution of the board of supervisors, may direct the district, county or town superintendents to report as to the character of the highway proposed for construction or improvement, and to take such action in respect thereto as the commission deem desirable. See section 33, subdivision 6, and section 47, subdivisions 9, 13 and 14.

§ 125. **Maps, plans, specifications and estimates.**—Whenever the commission shall have determined upon the construction or improvement of a state highway, or section thereof, or shall have approved a resolution adopted by a board of supervisors in any county requesting the construction or improvement of a county highway, or a section thereof, the commission shall direct the division engineer of the division wherein such highway or section thereof is situated to make surveys, and prepare suitable preliminary maps, plans and specifications. Such division engineer shall, subject to the direction and control of the commission, have the following powers and duties in respect to such highways:

1. He shall cause the highway or section thereof designated by the commission, or described in such resolution, to be mapped both in outline and profile.

2. He may provide for a deviation from the line of a highway already existing, if thereby a shorter or more direct highway, or a lessened gradient may be obtained without decreasing the usefulness of the highway.

3. He may provide for the widening of an existing highway.

4. He shall prepare preliminary plans and specifications for the construction or improvement of such highway or section thereof providing for a telford, macadam or gravel roadway, or other suitable construction, taking into consideration climate, soil and materials to be had in the vicinity thereof, and the extent and nature of the traffic likely to be upon such highway, specifying in his judgment the kind of highway a wise economy demands.

5. He shall provide in such plans and specifications for necessary culverts, drains, ditches, waterways, embankments, guard-rails and retaining walls.

6. He may provide therein for the removal or planting of trees, within the boundaries of the highway, when necessary for the preservation thereof.

7. He shall provide therein for the erection of suitable guide boards.

8. He may provide for such other work as may be required to complete the construction or improvement in a proper manner.

9. He shall cause an estimate to be made of the cost of the construction of such highway or section thereof in accordance with such plans and specifications. In making such estimate he shall ascertain with all practical accuracy the quantity of embankment, excavation and masonry, the quantity of all materials to be used and all items of work to be placed under contract and specify the estimated cost thereof.

**Derivation.** This section is derived from L. 1898, chap. 115, § 4, in part, as amended by L. 1907, chap. 717. It has been rewritten so as to provide for a more orderly arrangement of the subject matter and also for the purpose of providing for maps, plans, specifications and estimates for the construction or improvement of state highways. The part of subdivision 9 which relates to the itemizing of the estimate is new.

**Application of section.** As soon as the commission has determined to construct or improve any portion of a State highway, or has approved the petition of the board of supervisors requesting the construction or improvement of a county highway, the next step is the making of surveys and the preparation of preliminary maps, plans and specifications. These maps, plans and specifications are to be primarily prepared by the division engineer. They must be made in conformity with the provisions of this section. In performing this duty the division engineer acts under the direction and control of the commission. He is the agent of the commission for the purpose of determining the character of the construction or improvement and the manner in which it should be carried out. The division engineer is required to submit his work to the commission and the commission thereupon takes action, as provided in the subsequent sections of this article.

**Deviation from line of highway.** This section authorizes provision for a deviation from the line of an existing highway. A right of way may be acquired as provided in sections 148-155.

**Itemized estimate.** Under the former law there was no provision for itemizing the estimate of the cost of the construction of the highway. Under subdivision 9 of this section the division engineer is required to state the estimated cost of embankment, excavation, masonry, materials to be used and all other items of work required to be done under the contract. Proposals are to be submitted under section 130 in conformity with such itemized estimate, and are to include the amount to be charged for each item specified in the estimate. Subdivision 3 of section 130, provides that "the lowest bid shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate therefor." And under subdivision 9 of that section if a supplemental contract is awarded for work not included in the original contract, the amount to be charged therefor cannot exceed the rate specified for the same kind of work in the original contract.

§ 126. **Submission of maps, plans and specifications to district or county superintendent.**— The commission shall cause the preliminary maps, plans and specifications for either a state or county highway, or a copy thereof, to be presented to the district or county superintendent of the district or county in which such highway or section thereof is situated, who shall personally examine the highway or section thereof and the proposed maps, plans and specifications, and shall recommend any modification thereof which in his judgment seems to be necessary and shall report thereon within sixty days to the commission. He shall also take such other action in respect thereto as may be required by law or by the commission.

**Derivation.** This section is new.

**Object and application.** The object of this section is to enable the commission to secure the benefit of the knowledge and experience of the local officer. His acquaintance with local conditions makes his advice desirable, the ultimate object being to secure a specific plan adapted to the specified highway instead of a general plan. It is also provided that upon the receipt of the report and recommendations by the county or district superintendent the commission shall transmit the plans, specifications and estimate, in the case of a county highway, to the board of supervisors. See § 15, subd. 11, *ante*.

§ 127. **Action of commission in respect to maps, plans, specifications and estimates.**— Upon receiving the report of the district or county superintendent, as provided in the preceding section, the commission shall finally adopt the maps, plans, specifications and estimates which are to be used for the construction or improvement of the state or county highway to be constructed or improved. If such highway be a state highway the commission shall thereupon proceed to advertise and award contracts for the construction or improvement thereof as provided in section one hundred and thirty. If such highway be a county highway the commission shall transmit such plans, specifications and estimates as adopted by them to the board of supervisors of the county from which the resolution proceeded, together with their certificate approving the construction or improvement of the highway or section thereof designated in such resolution.

**Derivation.** The part of this section which relates to maps, plans, specifications and estimates for county highways is taken from L. 1898, chap. 115, § 5, as amended by L. 1907, chap. 717.

**Effect of section.** This section provides for the final adoption of the maps, plans, specifications and estimates for a State highway, as soon as the district or county superintendent has reported in respect thereto and the com-

mission is thereupon authorized to proceed to advertise and award contracts for such construction or improvement. In the case of a county highway, the commission is to finally adopt the maps, plans, specifications and estimates, upon receiving the report of the district or county superintendent, and it must then transmit the same to the board of supervisors. Upon the approval or modification thereof by the board of supervisors, the commission is to proceed to let a contract for the construction of a county highway as provided in this article.

§ 128. **Final resolution of board of supervisors.**— The board of supervisors, after the receipt of plans, specifications and estimate of a county highway or section thereof, and after such modification thereof as may be made by a majority vote of such board, with the consent of the commission, may approve such plans, specifications and estimate, and adopt a resolution requesting that such county highway or section thereof be constructed or improved under the provisions of this article, in accordance therewith. In the case of a county highway or a section thereof which divides two or more counties, such resolution must be separately adopted by the board of supervisors of each county within which a portion of such highway lies. The form of such resolution shall be prescribed by the commission and shall contain the matter required by this article to be inserted therein. Immediately upon the adoption of such resolution the clerk of the board of supervisors shall transmit a certified copy thereof to the commission. When a board of supervisors has once adopted a resolution providing for the construction or improvement of a highway or a section thereof in accordance with such plans and specifications, no resolution thereafter adopted by such board shall rescind or annul such prior resolution either directly or indirectly, excepting under the advice and with the consent of the commission. Notwithstanding the adoption of such a resolution, the commission may modify such plans, specifications and estimate, prior to the award of a contract therefor and, upon the approval thereof by the board of supervisors as above provided, such highway or section thereof shall be constructed or improved in accordance with such plans, specifications and estimate.

**Derivation.** This section is taken from L. 1895, chap. 115, § 6, first three sentences, as amended by L. 1907, chap. 717. The last sentence of this section is new. The former law contained a provision to the effect that "the date of the receipt by the state engineer of a certified copy of the resolution passed by the board of supervisors last approving such plans, shall determine its place upon the list of roads to be taken up for construction, as provided by § 10 of this act." In the case where it is sought to improve a road

which divides two or more counties, this provision was thought by the committee to be unnecessary.

**Modification of plans.** If the plans and specifications as furnished by the commission do not conform to the ideas of the board, the board may suggest modifications thereof which will be made if they are approved by the commission. The board should plainly state its reasons why the modifications are desired. Before advising such modifications it should be well informed as to the existing conditions and may call upon the district or county superintendent to furnish such expert advice as the situation demands. See section 33, subdivision 8, *ante*, p. 24.

If the commission deems it advisable to modify plans and specifications which have been approved by a board of supervisors, it must submit such modifications to the board for its approval.

Official action is required by a board of supervisors in respect to the plans and specifications because of the fact that the county and town, both of which are represented by the board, must bear a considerable proportion of the expense of the construction.

**Rescinding prior resolution.** After plans, specifications and estimates have been prepared and approved by the board by resolution it is assumed that the county has become a party to the construction or improvement of the highway in accordance with such plans, specifications and estimates. Originally a resolution approving the plans, specifications and estimates could not be modified by any subsequent action of the board. The present statute provides that such resolution may not be rescinded or annulled unless consented to by the commission. Under the former law there was no power either with or without the consent of the State Engineer to rescind or annul a resolution providing for the construction or improvement of a highway. But experience has shown that cases may sometimes arise that make it desirable to give up temporarily the construction of a highway, or conditions may be such as to make it essential to entirely abandon the proposed construction or improvement. When such conditions exist the present law enables the commission to authorize the board of supervisors to rescind or modify the resolution. Where contracts have been let in accordance with the plans, specifications and estimates approved by the board of supervisors the resolution may not be rescinded even with the consent of the commission if thereby any of the rights of the contractor are affected.

The form of the final resolution will be prescribed by the commission. It should contain all the provisions specified in this section and should also conform to the requirements of County Law, § 17, set forth in the note to section 123. It must provide for raising the money required to pay the share of the cost of the construction or improvement which is to be borne by the county and town. See section 139, *post*. The following form will be found available.

#### FORM No. 44.

##### Final Resolution of Board of Supervisors.

*Resolution* approving plans, specifications and estimate for the construction or improvement of a county highway in the town [or towns] of \_\_\_\_\_, requesting such construction or improvement and providing for raising money to pay the county's and town's portion of the cost thereof.

*Passed* by the board of supervisors of the county of \_\_\_\_\_, on the \_\_\_\_\_

day of \_\_\_\_\_, 19\_\_\_\_, pursuant to section 128 of the Highway Law, a quorum being present and \_\_\_\_\_ supervisors voting in favor of such resolution and \_\_\_\_\_ supervisors voting against the same.

1. *Whereas*, at a meeting of this board held on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, a resolution was adopted pursuant to section 123 of the Highway Law requesting the construction or improvement of that portion of the highway commonly known as \_\_\_\_\_, and described as follows:

in accordance with the provisions of article six of the Highway Law, and;

2. *Whereas*, the State Commission of Highways has examined such highway and determined that a section of said highway is of sufficient public importance for construction or improvement in accordance with the provisions of article six of the Highway Law and has certified its approval of the said resolution; and

3. *Whereas*, said commission has caused a section of said highway, which section is described as follows: \_\_\_\_\_ to be surveyed and mapped, and has caused plans and specifications and an estimate of cost to be made for said construction or improvement, and has transmitted the same to this board; therefore, be it

4. *Resolved*, That this board request that the highway above described in paragraph one, be constructed or improved as a county highway in that portion thereof above described in paragraph three in accordance with the maps, plans, specifications and estimates prepared for such construction or improvement by the State Commission of Highways under the provisions of article six of the Highway Law. That said work be done under the charge, care and superintendence of the State Commission of Highways, and that said maps, plans, specifications and estimate prepared for said work, under the direction of the commission as provided in section 125 of the Highway Law, are hereby duly approved and adopted by this board.

5. *Resolved*, That there is hereby appropriated the sum of \_\_\_\_\_ dollars, an amount sufficient to pay the share of the cost of the construction or improvement of such county highway which is to be borne by the said county and towns, as determined in accordance with the provisions of section 141 of the Highway Law, and the county treasurer is hereby authorized and directed to pay such portion of the amount so appropriated as may be required to pay the said share, upon the requisition of the commission. [If the entire cost is to be paid in the first instance by the State the following paragraph should be inserted in place of paragraph 5.]

6. *Resolved*, That this board hereby requests that the State Treasurer pay the entire cost of the construction or improvement of such county highway, in the first instance, upon the warrant of the comptroller drawn upon the requisition of the State Commission of Highways, as provided in section 143 of the Highway Law, and that the county of \_\_\_\_\_, and the town [or towns] of \_\_\_\_\_ be charged annually with their share of the interest and sinking fund, as provided by chapted 469 of the Laws of 1906, and the acts amendatory thereof, based upon the apportionment made by the State Commission of Highways of the said county's and town's share of the cost of the construction or improvement of such county highway.

6. *Resolved*, That the clerk of this board is hereby directed to forthwith transmit a certified copy of the foregoing resolution to the State Commission of Highways.

[Attach certificate of clerk of board as in Form No. 43.]

§ 129. **Order of construction of county highways.**— Upon the receipt of such resolution the commission shall proceed with the improvement or construction of such county highway as provided in this article. The construction and improvement of such county highways and sections thereof shall be taken up and carried forward within a county in the consecutive order as determined by the date of the receipt by the commission in each case of the certified copy of the final resolution, so far as is practicable in the opinion of the commission. No such highway shall be placed upon the list of highways to be constructed or improved nor receive a consecutive number on such list, unless such resolution shall appropriate and make immediately available for such construction or improvement the counties' and towns' share of the cost thereof, or shall request that the whole cost of such construction or improvement shall be paid in the first instance by the state and that the county and town or towns shall be charged annually by the comptroller with the amount properly chargeable thereto, under the provisions of chapter four hundred and sixty-nine of the laws of nineteen hundred and six, and the acts amendatory thereof.

**Derivation.** This section is taken from L. 1898, chap. 115, § 10, as amended by L. 1907, chap. 707. Under the former law the order of construction within a county was based absolutely upon the date of the receipt in each case of a certified copy of the final resolution of the board of supervisors. Under the above section the commission may, if it is not practicable to follow such order, deviate therefrom.

§ 130. **Contracts for construction or improvement of highways.**— State and county highways shall be constructed or improved by contract. Upon the completion and final adoption or approval, as provided by law, of the plans, specifications and estimate for the construction or improvement of a state or county highway, contracts therefor shall be executed as provided herein.

1. *Advertising for proposals.*—The commission shall advertise for proposals for the construction or improvement of such highways or sections thereof according to the plans, specifications and estimate prepared therefor. The advertisement shall be limited to a brief description of the work proposed to be done, with an announcement stating where the maps, plans, specifications and estimate may be seen, the terms and conditions under which proposals will be received, the time and place where the same will be opened, and such other matters as the commission may deem



advisable to include therein. Such advertisement shall be published at least once in each week for two successive weeks in a newspaper published at the county seat of the county in which such highway or section thereof is to be constructed or improved, and in such other newspapers as the commission may designate.

2. *Proposals.*— Each proposal shall specify the gross sum for which the work will be performed and shall also include the amount to be charged for each item specified in the estimate. The commission may prescribe and furnish forms for the submission of such proposals and may prescribe the manner of submitting the same which shall not be inconsistent herewith. The proposals when opened shall be subject at all reasonable times to public inspection, and at the time of opening shall be publicly read, and conspicuously posted in such a manner as to indicate the several items of the proposal.

3. *Award of contracts.*— The contract for the construction or improvement of such highway or section thereof shall be awarded to the lowest responsible bidder, except that no contract shall be awarded at a greater sum than the estimate made for the construction or improvement of such highway or section thereof in accordance with such plans and specifications. The lowest bid shall be deemed to be that which specifically states the lowest gross sum for which the entire work will be performed, including all the items specified in the estimate therefor.

4. *Estimates may be amended.*— If no proposal otherwise acceptable is made within the estimate accompanying the plans and specifications, the commission may cause the estimate to be amended. If the highway to be constructed or improved is a county highway the commission shall certify the amended estimate to the board of supervisors and the board shall take action thereon as in a case where plans, specifications and estimates are originally submitted to a board of supervisors. Upon the amendment of such estimate, and its approval by the board of supervisors in case of a county highway, the commission may proceed anew to obtain proposals and award the contract as provided in this section.

5. *Rejection of proposals.*— The commission may reject any or all proposals and may advertise for new proposals as above provided, if, in their opinion, the best interests of the state will thereby be promoted.

6. *Form of contract.*— The commission shall prescribe the form of contract and may include therein such matters as they

may deem advantageous to the state. Such forms shall be uniform so far as may be.

7. *Bond of contractor.*—Each contractor, before entering into a contract for such construction or improvement, shall execute a bond in the form prescribed by the commission, with sufficient sureties, to be approved by the commission, conditioned that he will perform the work in accordance with the terms of the contract, and with the plans and specifications, and that he will commence and complete the work within the time prescribed in the contract. Such bond shall also provide against any direct or indirect damages that shall be suffered or claimed on account of such construction or improvement during the time thereof, and until the highway is accepted.

8. *Payments on contract* — The contract may provide for partial payments to an amount not exceeding ninety per centum of the value of the work done, which shall be paid in the manner provided by this article when certified to by the commission. Ten per centum of the contract price shall be retained until the entire work has been completed and accepted.

9. *Contingencies.*— All contingencies arising during the prosecution of the work shall be provided for to the satisfaction of the commission and as may be agreed upon in the original or by a supplemental contract executed by the commission; the amount to be expended shall not exceed the original estimate, unless such estimate shall have been duly amended by the commission and, in the case of a county highway, submitted to the board of supervisors for its approval. If a supplemental contract be executed by the commission for the performance of work or furnishing of material not provided for in the original contract, the amount to be charged thereunder for any such work or material shall not exceed the rate for which similar work or material was agreed to be performed or furnished under the original bid upon which the contract was awarded. Such supplemental contract shall not be binding unless it be approved by the commission in case of a state highway and in case of a county highway, by the chairman of the board of supervisors and the district or county superintendent.

*Derivation.* This section is taken from L. 1898, chap. 115, § 8, as amended by L. 1907, chap. 717. The former law required advertisement in a newspaper once in each week for two successive weeks. There is no change made in this respect in the present law. The present law specifically states

what the advertisement shall contain. The provisions of subdivision 2, relating to proposals are new in effect. That part of subdivision 3 which describes what constitutes the lowest bid is also new. Subdivision 6 authorizing the commission to prescribe the form of the contract and include therein such matters as are deemed advantageous to the State is new. That part of subdivision 9 requiring the supplemental contract to conform to the rates specified in the original bid and requiring the approval of such supplemental contract, in case of a State highway, by the commission, and in case of a county highway, by the chairman of the board of supervisors and the district or county superintendent, is new.

**Time of taking effect.** It is provided in subdivision 2 of section 317 that the provisions of section 130, pertaining to the award of contracts for the construction of county highways shall take effect immediately, May 19, 1908, and shall apply to contracts to be awarded under chapter 115 of the Laws of 1898, and the acts amendatory thereof prior to January first, 1909; and until the commission shall have been appointed and have duly qualified, the State Engineer and Surveyor shall exercise the powers and perform the duties conferred upon the commission by such section 130.

**Subletting of contracts.** It is provided by L. 1897, chap. 444, § 1, that "A clause shall be inserted in all specifications and contracts hereafter made or awarded by the State, or by any county, or any municipal corporation, or any public department or official thereof, prohibiting any contractor to whom any contract shall be let, granted or awarded as required by law from assigning, transferring, conveying, subletting or otherwise disposing of the same or of his right, title or interest therein or his power to execute such contract to any other person, company or corporation without the previous consent in writing of the department or official awarding the same." Section 2 of such act provides that in case such a contract is so sublet or assigned that the department or officer awarding the same may revoke or discharge it. Such section also provides that nothing contained in the act shall prevent an assignment by the contractor "for the benefit of his creditors, made pursuant to the statutes of this state."

A contractor by giving an order upon a fund to accrue from the performance of a public contract does not thereby controvene the provisions of the above section. *Brace v. City of Gloversville*, 167 N. Y. 452 (1901). The above statute is designed to prevent a party obtaining a public contract from assigning the whole or any substantial part thereof to some other person, and thus relieve himself from his responsibility in respect thereto. It has been held not to prevent a mason who obtained a contract to erect a school building in a city from subletting the carpentry work to a practical carpenter. *Ocorr & Rugg Co. v. City of Little Falls*, 77 App. Div. 592, 79 N. Y. Suppl. 251, affirmed, 178 N. Y. 622 (1902).

**Contracts in pursuance of appropriations.** The State Finance Law, section 38, as added by L. 1899, chap. 479, provides as follows: "A contract or contracts made in pursuance of an appropriation by the state for a specific object shall be for the completion of the work contemplated by the appropriation, and in the aggregate shall not exceed the amount of such appropriation. A contract for a part of such work shall not be binding upon the state until contracts are also made covering the entire work contemplated by such appropriation, except where it is expressly provided by such appropriation

that a part of the work may be done by day's labor. Every such contract shall be accompanied by a bond for the completion of the work specified in the contract, within the amount stipulated therein, which bond shall be filed in the office of the state comptroller."

**Contracts not to be made without appropriations.** It is provided by section 35 of the State Finance Law as added by L. 1899, chap. 580, that "A state officer, employee, board, department or commission shall not contract indebtedness on behalf of the state, nor assume to bind the state in an amount in excess of money appropriated or otherwise lawfully available."

**Officers not to be interested in contracts.** Penal Code, section 473 provides that "A public officer or school officer, who is authorized to sell or lease any property, or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly, except in cases where such sale, lease or contract, or payment under the same, is subject to audit or approval by the superintendent of public instruction, is guilty of a misdemeanor."

### § 131. Award of contracts to board of supervisors or town board.

— A board of supervisors of a county, or a town board of a town, in which any portion of a county highway is situated, may present proposals and be awarded a contract for the construction or improvement of such highway, as provided in this article, for and on behalf of such county or town. If such contract be awarded to a board of supervisors or a town board such board shall, by resolution, designate some suitable person or persons to carry into effect, on behalf of the town, such contract, and transact all business in respect thereto as may be necessary. A member of the board of supervisors or town board at the time such contract was awarded or such designation was made, or a person who is a partner of, or a stockholder in the same corporation as that of such member, shall not be so designated. A member of the board of supervisors or town board at the time such designation was made, or a firm, corporation or association of which he is a member or has an interest, shall not be directly or indirectly interested in any such contract nor shall such member, or such firm, corporation or association furnish materials or perform labor or services, either directly or indirectly, under or in connection with the performance of any of the work required in accordance with such contract, nor shall such member, firm or corporation or association, be paid for materials furnished or services rendered in respect to such contract. The clerk of the board of supervisors or the town clerk shall transmit a certified copy of the resolution designating the person or persons to

carry into effect such contract to the commission prior to the awarding of a contract to the board of supervisors or town board. The person or persons so designated shall, before the contract is executed, give an undertaking to the county or town, with sureties to be approved by the commission and the board of supervisors or town board, for an amount equal to the amount of the bid presented by the county or town. Such undertaking shall be conditioned on the faithful performance of their duties in respect to such contract and for the proper accounting, safe-keeping and lawful disbursement of all moneys that may come into their hands thereunder. Such undertaking shall be filed in the office of the county or town clerk and a copy thereof shall be transmitted to the commission. The person or persons so designated shall thereupon be competent to receive all moneys payable under such contract under the provisions of this article, and they shall account therefor to the county or town. The board of supervisors or town board, after such contract is awarded, shall designate, by resolution, a banking corporation or a trust company wherein the moneys received under such contract shall be deposited. Such bank or trust company shall, upon the request of the board of supervisors or town board, make a statement of the money so deposited. The commission shall, by rules and regulations, prescribe the manner in which the moneys received under such contract shall be expended and the forms of accounts to be kept by the person or persons designated as above provided. Reports may be required by the commission from time to time from such person or persons.

**Derivation.** L. 1898, chap. 115, § 8, as amended by L. 1907, chap. 717, provides that "A board of supervisors of a county or a town board of a town in which any portion of such highway lies may offer bids and be awarded such contracts for and on behalf of their respective counties and towns." All that part of the above section which prescribed the procedure in the case of an award of a contract to a county or town is new.

**Award of contracts to town or county.** Except for the provisions of this section a county or town would have no authority to enter into a contract with the commission for the construction or improvement of a county highway. When a contract is so awarded a county or town is made subject to the same provisions of law as in the case of any other contractor. A town or county is required under subdivision 7 of the preceding section to execute a bond for the performance of the work in accordance with the terms of the contract. If there is any failure on the part of the person designated by the town or county in the execution of the contract, the town or county will be liable therefor. When the bid of the town or county is accepted the work is to be performed under the provisions of this article in the same manner

as though the contract were awarded to any other contractor, and the provisions of this article apply thereto.

**Designation of person to carry into effect contract.** The provisions of the above section requiring a board of supervisors or a town board to designate some suitable person to carry into effect the contract awarded to such town or county are for the purpose of providing proper administrative methods in executing contracts awarded to a county or town. The interests of the town or county are safeguarded by making some one person directly responsible for the proper execution of the contract. The commission is thus enabled to deal directly with a responsible person. Such person is required to execute an undertaking which is to protect the State, the county and the town from loss in making the required expenditures pursuant to the contract. A person so designated is the agent of the county or the town and such county or town is responsible for his acts.

**§ 132. Suspension of work under contract; completion by commission.**—If the division engineer shall determine that the work upon any contract for the construction or improvement of a state or county highway is not being performed according to the contract or for the best interests of the state, he shall so certify to the commission and the commission may suspend or stop the work under the contract while it is in progress, and shall thereupon complete the work in such manner as will accord with the contract specifications, and be for the best interests of the state, or it may cancel the contract and readvertise and relet as provided in section one hundred and thirty, and any excess in the cost of completing the contract beyond the price for which it was originally awarded shall be charged to any paid by the contractor failing to perform the work. Every contract for the construction or improvement of a state or county highway shall reserve to the commission the right to suspend or cancel the contract as above provided, and to complete the work thereunder or readvertise and relet as the commission may determine.

**Derivation.** This section is new. A similar provision relating to contracts for the construction of the Barge canal is contained in section 7 of L. 1903, chap. 147.

**§ 133. Acceptance of state highway when completed.**—Upon the completion of a state highway or section thereof constructed or improved under a contract let as provided in this article, the division engineer together with the county or district superintendent shall inspect the same and if it be completed as provided in the contract, they shall thereupon report to the commission, who shall, if it approve, notify the contractor of that fact and the highway or section thereof so constructed or improved shall be deemed to have been accepted by the state.

**Derivation.** This section is new and relates only to State highways.

The division engineer is required by subdivision 3 of section 17 to "examine and inspect or cause to be examined and inspected the work performed on any highway, and report to the commission as to whether the work has been done in accordance with the plans and specifications and contracts made therefor." The inspection required under the above section is for the purpose of determining whether a State highway has been finally completed in accordance with the terms of the contract. This is the final inspection to be made prior to the acceptance of the work by the State. Upon the report of the inspection the commission is to determine whether the work shall be accepted.

§ 134. **Acceptance of county highway.**—Upon the completion of a county highway or section thereof, constructed or improved under a contract let as provided in this article, the commission shall inform the district or county superintendent and the board of supervisors of the county in which such highway or section thereof is located in writing, that it will accept the work on behalf of the state and county within twenty days from the date of such notice, unless protest shall be filed with him in writing by the district or county superintendent or by the chairman of the board of supervisors. In case a protest is filed the commission shall hear the same and if it is sustained it shall delay the acceptance of the highway or section thereof until it be properly completed. Upon the proper completion of such highway or section thereof and after filing the notice above given it shall be deemed to have been accepted by the board of supervisors of such county and thereafter it shall be maintained as provided in this chapter.

**Derivation.** This section is taken from the first two sentences of section 12 of L. 1898, chap. 115, as amended by L. 1907, chap. 717.

**Inspection by district or county superintendent.** It is made the duty of the district or county superintendent, under subdivision 8 of section 33, *ante*, p. 24, "to inspect or cause to be inspected if so directed by the board of supervisors, each county highway during its construction or improvement, and certify to the board of supervisors the progress of the work, and report to the commission any irregularities of the contractor or any failure on his part to comply with the terms of the contract." The board of supervisors is vested with the power to protest against the acceptance of a completed county highway. It may act upon information secured by its individual members, or by the county or district superintendent, acting under its direction. The protest is to be submitted to the commission and the commission is required to investigate and determine from the evidence before it, and from a personal examination, if thought necessary, whether the highway has been properly completed. The commission may thereupon compel the proper completion of the highway.

§ 135. **Entry upon adjacent lands for drainage purposes.**— Lands adjacent to a state or county highway may be entered upon and occupied for the purpose of opening or constructing a drain or ditch so as to properly drain such highway:

1. By a contractor; or any of his agents or employees, when directed by the commission, during the construction or improvement of such highway.

2. By the commission or its duly authorized officers, agents or employees, at any time, for the purpose of making surveys for such drain or ditch.

3. By the commission, or its duly authorized officers, agents or employees, or by a county, district or town superintendent, when directed by the commission, after the completion and acceptance of the highway for the purpose of opening, constructing or maintaining ditches or drains upon such lands, necessary for the proper maintenance of such highway.

**Derivation.** This section is intended as a substitute for that part of sections 4 and 13 of L. 1898, chap. 115, as amended by L. 1907, chap. 717, which authorizes an entry upon adjacent lands for the purpose of constructing and maintaining drains. Under the former law it was made the duty of the highway commissioner of the town to enter upon adjacent lands and open existing ditches for the purpose of draining a county highway. It is provided in this section of the present law that either the commission, its duly authorized employees, or a county, district or town superintendent may enter upon adjacent lands after the completion of a highway, for the purpose of draining such lands.

**Entry by town superintendent.** Under section 57, *ante*, p. 80, the town superintendent is authorized to enter upon lands adjacent to any highway either State, county or town for the purpose of opening existing ditches or drains, digging new ditches, and performing other labor necessary to protect the highway from damages caused by streams. In section 58 the damages incurred by the owner of adjacent lands because of such entry are made a town charge. If the entry be made by a town superintendent, when directed by the commission for the protection of a State or county highway, this section applies instead of section 57.

§ 136. **Damages for entry.**— The commission may agree with the owner of lands entered upon and occupied as provided in the preceding section for the payment of damages caused by such entry, or if unable to so agree the right to enter and occupy such lands may be acquired and the damages therefor shall be ascertained as provided in the condemnation law. Such damages shall, in the case of a state highway, be paid out of moneys available for the construction or improvement of such highway, and in



the case of a county highway shall be a county charge and paid in the same manner as other county charges.

**Derivation.** Under L. 1898, chap. 115, §§ 4 and 13, as amended by L. 1907, chap. 717, the damages agreed upon or awarded in case of an entry upon adjacent lands for the digging of a ditch during the construction, were made a charge upon the fund available for the work. Under section 14 of that act, in case of an entry upon adjacent lands and ditching after the highway was completed the damages were made a town charge. Under the above section of the present law the damages in every case are a county charge, where the highway is a county highway, and a State charge, where it is a State highway.

**Condemnation.** The condemnation proceedings authorized to be brought by the commission in case of it being unable to agree with the owner of adjacent lands as to the damages, are to be brought under sections 3357-3397 of the Code of Civil Procedure. Condemnation required is of the right to enter upon the adjacent lands and occupy them for the purpose of constructing and maintaining the necessary ditches or drains. It will not be sought in any case to acquire by those proceedings the title to the entire property.

§ 137. **State and county highways in villages.**— A state and county highway may be constructed through a village in the same manner as outside thereof, unless the street through which it runs has, in the opinion of the commission, been so improved or paved as to form a continuous and improved highway of sufficient permanence as not to warrant its reconstruction, in which case such highway shall be constructed or improved to the place where such paved or improved street begins. If it is desired to construct or improve any portion of a state or county highway within such village at a width greater than that provided for in the plans and specifications therefor, or if a modification of the plans and specifications is desired by which the cost thereof is increased, the board of trustees of such village shall petition the commission by resolution, to so modify such plans and specifications as to provide for such construction. The commission shall thereupon cause the plans, specifications and estimate for such highway to be modified so as to provide for such additional construction, and shall provide therefor in the contract. Upon the completion of such state or county highway within the village in accordance with such modified plans and specifications the commission shall notify the board of trustees as provided in the case of a county highway. Such board may file a written protest against the acceptance of such work with the commission who shall examine in respect thereto, and if it is sustained the commission shall delay the acceptance of the highway

within the village until it be properly completed. Upon the proper completion thereof and the notification as above provided, the commission shall certify to the board of trustees the cost of such additional construction, and such board shall pay the same out of moneys raised by tax or from the issue and sale of bonds as provided in the village law. The provisions of the general village law, special village charters and other general or special laws relative to the pavement or improvement of streets and the assessment and payment of the cost thereof shall apply, so far as may be, to such additional construction and the assessment and payment of the cost thereof.

**Derivation.** This section is new.

**Object of section.** In the former Higbie-Armstrong Act, highways constructed jointly by the State, county and town were not to be extended through incorporated villages unless it was necessary to connect highways which had already been constructed or improved, and where such connecting highways did not exceed one mile in length. This section provides for the construction or improvement of a State or county highway within the limits of an incorporated village. The provision is evidently based upon experience. Many villages are unable or unwilling to provide suitable improvement of their streets in conformity with the method of construction applied to a State or county highway. If no provision was made for the extension of these highways through villages a lack of uniformity would result and the efficiency of the highway would be lessened.

§ 138. **Connecting highways in villages.**— The board of trustees of a village may, by resolution, petition the commission for the construction or improvement of a highway to connect streets or highways within the village, which have been paved or improved, with county highways which have been heretofore built under the provisions of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof. If in the judgment of the commission public convenience requires the construction or improvement of such connecting highway, the commission shall cause plans, specifications and estimates to be prepared, and shall cause the same to be transmitted to the board of supervisors of the county wherein such highway is situated, with a written statement of their reason for providing for such construction or improvement. A copy of such statement shall be filed in the office of the county clerk of such county. The board of supervisors shall thereupon adopt a resolution providing for such construction or improvement as provided in this article. The payment of the cost of such construction or im-

provement shall be provided for in such resolution as in other cases, and such payment shall be made in the same manner. A certified copy of such resolution shall be filed in the office of the commission. The construction or improvement of such connecting highway shall then be taken up in the order and manner provided in this article for the construction or improvement of county highways. If it is desired to construct or improve any portion of such a connecting highway at a width greater than that provided for in the plans and specifications therefor, or if a modification of such plans and specifications is desired by which the cost thereof will be increased, the board of trustees of the village shall proceed as in the preceding section to secure such a modification of the plans and specifications as will provide for such desired construction. The provisions of the preceding section shall apply in like manner to the connecting highway to be constructed or improved as provided in this section.

**Derivation.** L. 1898, chap. 115, § 15, as amended by L. 1907, chap. 717, provided for the construction of highways through an incorporated village, when they were necessary to connect highways already constructed outside of the village.

**Object of section.** This section is to provide for the construction or improvement of highways in a village where the same is necessary to connect paved or improved streets within the village with a county highway which has been heretofore built under the provisions of the Higbie-Armstrong Act. Where county highways are constructed pursuant to the provisions of this chapter, it may be constructed through a village in the same manner as outside thereof, as provided in section 137, *ante*.

§ 139. Resolution to provide for raising money.—The resolution of the board of supervisors providing for the construction or improvement of a county highway or section thereof shall either

1. Appropriate and make immediately available to the requisition of the commission an amount sufficient to pay the share of the cost of such construction or improvement which is to be borne by the county and town or towns within which such highway or section thereof is located; or

2. Request that the entire cost of the construction or improvement of such county highway or section thereof shall be paid in the first instance by the state and that the county and town or towns shall be charged annually with their share of the interest and sinking fund as provided in chapter four hundred and sixty-nine of the laws of nineteen hundred and six, as amended by

chapter seven hundred and eighteen of the laws of nineteen hundred and seven.

**Derivation.** This section is taken from a part of section 10 of L. 1898, chap. 115, as amended by L. 1907, chap. 717.

**Payment in the first instance by the State.** The resolution here referred to is the final resolution by the board of supervisors required by section 123. It is provided in section 129 that no highway shall be placed upon the list of highways to be constructed or improved unless the resolution of the board of supervisors shall appropriate and make available the county's and town's share of the cost thereof, "or shall request that the whole cost of such construction or improvement shall be paid in the first instance by the State, and that the county and town or towns shall be charged annually by the comptroller with the amount properly chargeable thereto, under the provisions of chap. 469 of the Laws of 1906, and the acts amendatory thereof." The amount which is to be charged annually to the county and town is specifically stated in chap. 469 of the Laws of 1906. Such act may be found on page 368.

Apportionment against town need not be made until after a contract is let, or it is definitely known what the cost of the work will be. Matter of Business Men's Association, 54 Misc. 11, 103 N. Y. Supp. 847 (1907).

§ 140. **Modifying method of payment.**—If a resolution has been heretofore adopted, or shall hereafter be adopted, by a board of supervisors, appropriating and making immediately available an amount sufficient to pay the share of the cost of the construction or improvement of a county highway to be borne by the county and the town or towns in which the highway is located, such board of supervisors may adopt a resolution requesting the state to pay the entire cost of the construction or improvement of such highway in the first instance and that the state charge the county and town or towns annually with their share of the interest and sinking fund, as provided in chapter four hundred and sixty-nine of the laws of nineteen hundred and six, and the acts amendatory thereof. The clerk of the board of supervisors shall transmit certified copies of such resolution to the commission and the state comptroller. If such resolution shall have been received by the commission and the state comptroller, prior to the advertisement for bids for the construction or improvement of such county highway or section thereof, the entire cost of such construction or improvement shall be paid in the first instance by the state and the share of the interest and sinking fund shall be charged annually against the county and town or towns in which such highway is located in the same manner and with the same effect as though the resolution had originally requested such payment and charge. The adoption of a resolution modifying the

method of payment of the share of the county and town or towns shall not affect or change the date of the filing of the original resolution providing for the construction or improvement of such highway nor alter in any way the order of construction determined by the date of the filing of the original resolution.

**Derivation.** This section is derived from L. 1898, chap. 115, § 6, as amended by L. 1907, chap. 717. The section is rewritten. The only substantial change is to the effect that the resolution modifying the method of payment of the share of the county and town must be transmitted to the commission prior to the advertisement for bids for the work rather than prior to the letting of the contract, as provided under the former law.

§ 141. **Division of cost of county highways; payments by county treasurer.**—Whenever the construction or improvement of a county highway or section thereof under a contract shall be completed and final payment therefor shall have been made the commission shall prepare a statement of the cost of such construction or improvement, including engineering expenses, inspection and all charges and expenses properly chargeable thereto, showing in detail the date of each payment, and the purpose and amount of such payment. Such payments shall be grouped as far as practicable by dates and the total thus obtained shall be deemed the cost of such construction or improvement, and a certified copy of said statement shall be filed by the commission in the office of the comptroller. If a county highway or section thereof so constructed or improved shall be situate in two or more towns or in two or more counties, the commission shall apportion such expense to such towns and counties according to the cost of such construction or improvement in each of such towns or counties. Such statement when audited and approved by the comptroller shall be filed in his office and shall be final, and a duplicate thereof shall be filed with the county treasurer of each county wherein the highway or section thereof has been improved. If the board of supervisors of any county shall have theretofore provided funds to pay two per centum of the cost of such county highway as thus determined, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said county for each mile of public highway within such county to be ascertained and determined by dividing the total assessed valuation of taxable property in said county as equalized for state purposes by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, and if the board of supervisors of any county shall have

theretofore provided funds to pay, on behalf of any town, one per centum of the cost of such improved highway as thus determined, for each one thousand dollars of assessed valuation of real or personal property liable to taxation in said town for each mile of public highway within said town to be ascertained and determined by adding to or deducting from the total assessed value of taxable property in said town as equalized for county purposes, the percentage of value, if any, added or deducted by the state board of equalization to equalize between counties for state purposes, and dividing the sum thus obtained by the total mileage of public highways in said town, exclusive of the streets and highways within any incorporated city or village in said town, but not exceeding thirty-five per centum of the cost for the county and fifteen per centum of the cost for the town or towns, as shown by such statement, it shall be the duty of the county treasurer to pay the amount thereof upon the requisition of the commission and thereafter the county and town shall be deemed to be fully discharged of its obligation to the state on account of the construction or improvement of such county highway, except the obligation to pay their proportionate amount of the state tax for the state's share of the cost of construction. At least ten days' notice shall be given by the commission to the county treasurer prior to the making of such a requisition. A copy of each contract providing for the construction or improvement of a county highway, and the plans and specifications therefor, together with copies of certificates showing the progress of the work, upon which requisitions are drawn, shall be filed with the county treasurer. The mileage of highways to be used in determining the amounts to be charged to a county or town under this section shall be the tables of mileage formerly prepared by the state engineer until the tables as provided in this chapter are filed.

**Derivation.** This section is derived from section 4 of L. 1906, chap. 469, as amended by L. 190, chap. 718, and is intended as a substitute for L. 1898, chap. 115, § 9, as amended by L. 1907, chap. 716. The part of section 4 of the act of 1906 is included and determines the amount to be paid by the county when a resolution has been adopted providing for the construction or improvement of a county highway, and making immediately available county funds for the purpose of paying the portion of the cost to be borne by the county and town. The provisions for notice before requisition, the filing of contracts and copies of certificates upon which requisitions are drawn are new.

**Object of section.** This section is for the purpose of determining the proportion of the cost of construction of a highway which is to be borne respec-

tively by the State, county and town. The section provides a means of ascertaining the amount to be paid by county and town upon the final completion of the work. It is based upon the assumption that the board of supervisors has already provided funds to pay the required amount, either by tax levied pursuant to the resolution, providing for the construction or improvement of highways, as provided in section 129, or by money borrowed by county and town under the provisions of section 142.

This section also provides that a copy of each contract for the construction or improvement of a county highway and the plans and specifications therefor, together with copies of the certificates showing the progress of the work, upon which requisitions are drawn shall be filed with the county treasurer. This provision supplies a very serious omission in the former law. Heretofore the county and town, although paying its half of the cost of construction had no knowledge of the plans and specifications and the details of the contract; neither did the county treasurer have any information by which he could test the regularity and validity of the requisitions drawn upon him from time to time. It was mandatory that he should pay the same, but in the discharge of this statutory duty he was compelled to rely entirely upon the drafts against him.

**Determination of amount payable by county and town.** In no event is the amount of the county's share of the cost of the construction or improvement to exceed 35 per cent. of the entire amount; and the cost to the town may not exceed 15 per cent. of the entire cost.

The county's share of the cost of a county highway is to be determined by dividing the assessed valuation of real and personal property of the county by the total number of miles of highways in the county exclusive of streets and highways within cities and villages; and then for each \$1,000 of the result so obtained, the county is to pay 2 per cent. of the entire cost of the county highway. As an example: If the total assessed valuation of real and personal property in the county is \$10,000,000 and the number of miles of highways outside of cities and villages is 1,000, there would be \$10,000 of taxable property for each mile of highway, which would require the county to pay 20 per cent. of the cost of the county highway. The same process is used to determine the amount chargeable against the town. For instance if the assessed valuation of a town is \$1,500,000 and the number of miles of highways in the town outside of villages, is 100 miles, there would be \$15,000 of assessed valuation of taxable property in the town for each mile of highway, so that the town, being required to pay 1 per cent. for each \$1,000 of assessed valuation, would be chargeable with 15 per cent. of the total cost of the county highway. The assessed valuation to be used in each instance is that valuation equalized as provided by law either by the State Board of Equalization in the case of a county or by the board of supervisors or other authority in the case of a town.

§ 142. **County or town may borrow money.**— If there are not sufficient funds in the county treasury to pay the share of the cost of the construction or improvement of a county highway which is to be borne by the county and town or towns, as appropriated and made immediately available by the resolution

providing for such construction or improvement, the county treasurer is authorized and directed to borrow a sufficient sum to pay such share in anticipation of taxes to be collected therefor and to pledge the faith and credit of the county for the payment of the amount when due with interest. Thereafter it shall be the duty of the board of supervisors to provide for the assessment, levy and collection of said apportioned amounts respectively as county and town charges, and to direct the payment of the aggregate amount by the county treasurer in the manner and at the times prescribed by law for the payment of state taxes to the state treasurer.

Upon the petition of the town board of any town, the board of supervisors of the county may, by resolution, authorize the town to borrow a sufficient sum to pay the share of the cost of the construction or improvement of a county highway which is to be borne by the town and to issue and sell town bonds therefore. Such bonds shall be sold by the supervisor for not less than par and the proceeds thereof shall be paid into the county treasury to be applied in payment of the share of such cost which is to be borne by such town. The board of supervisors shall, from time to time, impose upon the taxable property of the town a tax sufficient to pay the principal and interest of such bonds as they shall become due.

**Derivation.** The first paragraph of this section was taken from the last two sentences of section 2 of L. 1898, chap. 115, as amended by L. 1907, chap. 717. The second paragraph is new.

**Town may borrow money.** This section authorizes a town to borrow money to pay its share of the cost of the construction or improvement of a county highway. This was not permitted under the former law. It frequently happens that the town's share of the cost is too large to be conveniently raised in the town by an annual tax. This section is for the purpose of enabling the town to extend the payment of its share of the expense over a number of years. It is not necessary to submit the question of the issue of town bonds under this section to the voters of a town at a town meeting.

**Town and county bonds.** Many of the cases cited in the notes to sections 97 and 98, *ante*, are applicable to bonds issued under this section.

§ 143. **Payments from state treasury.**—If the resolution of the board of supervisors providing for the construction or improvement of a county highway or section thereof request the payment by the state in the first instance of the entire cost of such construction or improvement, the clerk of the board of supervisors shall file certified copies of such resolution with the commission and the state comptroller. The entire cost of such construction



er improvement shall thereupon be paid by the state treasurer upon the warrant of the comptroller drawn upon the requisition of the commission. The comptroller shall annually charge the county and town or towns in which such county highway is located with their share of the interest and sinking fund, as provided in chapter four hundred and sixty-nine of the laws of nineteen hundred and six and the acts amendatory thereof. It shall be the duty of the commission from time to time, whenever requested by the comptroller, to certify to the comptroller the apportionment of the cost of construction or improvement of any such highway or section thereof, between the state, county and town.

**Derivation.** This section is taken from L. 1898, chap. 115, § 6, in part, as amended by L. 1907, chap. 717.

**§ 144. Payment of cost of state highway.**— The entire expense of the construction or improvement of a state highway shall be paid by the state treasurer upon the warrant of the comptroller issued upon the requisition of the commission out of any specific appropriation made available for the construction or improvement of state highways.

**Derivation.** This section is new.

**§ 145. Abolition of railroad grade crossings.**— The commission shall provide for and cause the abolition of railroad grade crossings on a state or county highway whenever practicable, in the manner provided by the railroad law. The portion of the cost of abolishing such grade crossings, which is payable under the railroad law by the state and town or village, shall be paid out of the funds available for the construction or improvement of such state or county highway as provided in this article.

**Derivation.** This section is taken from part of section 4 of L. 1898, chap. 115, as amended by L. 1907, chap. 717.

The provisions of the Railroad Law applicable to the abolition of railroad grade crossings, are sections 61-65. It was proposed by the joint highway committee to amend these sections of the Railroad Law so as to provide a proper procedure for the abolishing of grade crossings on State and county highways. The time of this committee was so taken up in the preparation of the Highway Law that it was unable to prepare for submission to the Legislature the proposed changes in the Railroad Law. It is to be expected that the Legislature of 1909 will enact such changes as may be required in the Railroad Law to carry into effect the suggestion contained in the above section of the Highway Law, relating to the abolition of railroad grade crossings on State and county highways.

§ 146. **Street surface railroads on highways.**—No street surface railroad shall be constructed upon any portion of a state or county highway which has been or may be improved under the provisions of this article, nor shall any person, firm or corporation enter upon or construct any works in or upon any such highway, except upon the approval of, and under such conditions and regulations as may be prescribed by the commission, notwithstanding any consent or franchise granted by the town superintendent or municipal authorities of any town. Any person, firm or corporation violating this section shall be liable to a fine of one thousand dollars for each day of such violation, to be recovered by the commission and paid to the state treasurer to the credit of the fund for the maintenance and repair of state and county highways, and may also be removed therefrom as a trespasser by the commission upon petition to the county court of the county or the supreme court of the state.

**Derivation.** This section was derived from L. 1898, chap. 115, § 20, as added by L. 1903, chap. 379, and renumbered and amended by L. 1907, chap. 717.

**Street railroads upon highways.** Sections 91 and 92 of the Railroad Law provide for the construction of street railroads on highways with the consent of property owners and local authorities. Notwithstanding a franchise secured by a street railway company under these sections of the Railroad Law to construct a railway along or upon a county or State highway, it is required before any such railroad shall be constructed thereon that application be made to the commission for its approval. The commission may authorize the construction of such a railway upon such conditions and regulations as it may prescribe. Railroad Law, section 11, provides that every railroad corporation which shall build its railroad along any highway shall restore the same to its former State, or to such State as not to have unnecessarily impaired its usefulness. The town superintendent is authorized to compel a railroad corporation to make such restoration. See section 73, *ante*, p. 101, and the notes thereunder.

§ 147. **Where cost is assessable against abutting owners.**—If fifteen per centum of the cost of constructing or improving a highway has been or may be assessed upon abutting owners, as authorized by section ten of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, as the same existed prior to its repeal by chapter four hundred and sixty-eight of the laws of nineteen hundred and six, such highway shall be constructed or improved at the joint expense of the state, county and town as provided herein, and the portion of the cost so assessable upon such owners shall be paid by the town in which such highway is located, as provided in this article.

**Derivation.** This section is a substitute for L. 1898, chap. 115, § 2, as amended by L. 1907, chap. 717, which permitted the submission of a proposition at a town meeting to determine whether the cost of improving a highway assessable upon abutting owners, should be chargeable against the town.

**Petition of abutting owners.** It was originally provided in the Higbie-Armstrong Act that the abutting land owners might petition the board of supervisors to improve the highway, in which case, if the petition was granted 15 per cent. of the cost of the construction was chargeable against such owners. Section 10 of L. 1898, chap. 115, relating to the assessment of abutting owners for the construction or improvement of a highway was repealed by L. 1906, chap. 468. This section is intended to apply to the petitions of abutting owners which were acted upon prior to the taking effect of such repealing act. As the section now stands all highways sought to be constructed upon such a petition are to be completed and paid for in the same manner as though a resolution had been regularly adopted by the board of supervisors providing for such construction at the joint expense of the State, county and town, so that the cost assessable against the abutting owners in such cases is now chargeable against the town.

### § 148. Acquisition of lands for right of way and other purposes.

— If a state or county highway, proposed to be constructed or improved as provided in this article, shall deviate from the line of a highway already existing, the board of supervisors of the county where such highway is located, shall acquire land for the requisite right of way prior to the actual commencement of the work of construction. The board of supervisors may also acquire lands for the purpose of obtaining gravel, stone or other material, when required for the construction, improvement or maintenance of highways, or for spoil banks, together with a right of way to such spoil banks and to any bed, pit, quarry, or other place where such gravel, stone or other material may be located.

**Derivation.** This section is taken from L. 1898, chap. 115, § 7, as amended by L. 1907, chap. 717, and also from parts of sections 1 and 2 of L. 1901, chap. 240.

**Deviation from line of highway.** The division engineer in preparing maps, plans and specifications may provide "for a deviation from the line of a highway already existing, if thereby a shorter or more direct highway, or a lessened gradient may be obtained without decreasing the usefulness of the highway." Section 125, subdivision 2, *ante*.

Where deviation is so provided for it is made the duty of the board of supervisors to acquire land for the requisite right of way, as provided in this article. The procedure to be followed, in case a purchase is not made, is prescribed in sections 150-154.

**Eminent domain.** The act of 1901, chap. 240, from which this section was in part derived, was intended to confer upon the board of supervisors, as the

official representative of the county in its corporate capacity, the power of eminent domain in respect to rights of way, required for the construction and improvement of State and county highways. *County of Orange v. Ellsworth*, 98 App. Div. 275, 90 N. Y. Supp. 576 (1904).

§ 149. **Purchase of lands.**—The board of supervisors may, by resolution, authorize its chairman, a member, or a committee to purchase the lands to be acquired for the purposes specified in the preceding section. But the amount to be paid under this section to a single owner shall not exceed the sum of two hundred dollars, unless approved by the county judge and county treasurer, and in no case shall such amount exceed the sum of one thousand dollars. The purchase price of such lands shall be a county charge, and shall be paid in the same manner as awards are paid in cases where the proceedings are taken as herein required.

**Derivation.** This section is taken from L. 1901, chap. 240, § 2, as amended by L. 1902, chap. 510. This section has been rewritten but without change in substance.

The resolution for the purchase of lands as a right of way for a State or county highway may be in the following form:

**FORM No. 45.**

**Resolution For Purchase of Right of Way.**

*Resolution* for purchase of right of way for county [or State] highway in town [or towns] of \_\_\_\_\_, county of \_\_\_\_\_.

*Passed* by the board of supervisors of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, pursuant to section 149 of the Highway Law, a quorum being present, and \_\_\_\_\_ supervisors voting in favor of such resolution and \_\_\_\_\_ supervisors voting against the same.

*Whereas* maps, plans and specifications adopted by the State commission of highways [and approved by this board by resolution passed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ (in case of a county highway)] for the construction or improvement of a State [or county] highway in the town [or towns] of \_\_\_\_\_, in the county of \_\_\_\_\_, provide for a deviation from the line of a highway already existing, requiring the acquisition by purchase or otherwise of a right of way for such highway. Therefore, be it

*Resolved*, that \_\_\_\_\_, members of this board, be hereby authorized as a committee to purchase lands required for a right of way for such State or county highway, located in the town of \_\_\_\_\_, and described as follows: [describe location of highway proposed to be constructed or improved]; that the said committee is authorized to purchase such lands wherever the boundaries of the highways, to be improved or constructed, as laid down in the map, plans and specifications prepared therefor under the direction of the State commission of highways, deviate from the boundaries of the existing highway.

*Resolved*, that such committee procure such right of way at the earliest time practicable, and as soon as the same is procured, file with the clerk of this board a written report of the quantity of lands purchased of each owner, the amount to be paid for each parcel, and the name and residence of each owner; and that the clerk of this board shall thereupon notify the State commission of highways, in writing, of the fact that such lands have been purchased.

[Certificate of clerk as in Form No. 43.]

§ 150. **Petition to acquire lands.**—If the board of supervisors is unable to acquire land by purchase as provided for in the last section, the board may present to the county court of the county or to the supreme court, at a special term thereof, to be held in the judicial department in which said county is located, a petition for the appointment of three commissioners of appraisal to ascertain and determine the compensation to be paid to the owners of the land to be acquired and to all persons interested therein. Such petition shall describe the land to be acquired with a reference to the map upon which the same is shown which shall be annexed to such petition. A copy of such map shall be filed in the office of the county clerk. Such petition shall be signed and verified in the name of the board of supervisors, by the chairman or a member thereof designated for that purpose by resolution. Notice of presentation of such petition to such court shall be given by the petitioner by publishing such notice in two newspapers published in such county, once in each week for two weeks successively preceding the day of such presentation, and also by posting a copy of said notice in not less than three public places in each town in which property to be acquired is located, at least eight days preceding the day of such presentation.

**Derivation.** This section is taken from L. 1901, chap. 240, § 3.

**Pleading of land owner.** While this section does not provide that the defendant land owner shall have an opportunity to deny or controvert the petition, or to interpose any pleading or defense or to litigate the right of the plaintiff to maintain the proceeding, such land owner may interpose a defense by petition and do whatever is authorized to be done under the Condemnation Law to protect his interests in respect to the premises sought to be acquired. The procedure here provided for should be construed in connection with the proceedings required to be taken under the Condemnation Law (Code of Civil Procedure, §§ 3357-3381). By taking these sections of the Highway Law in connection with the Condemnation Law, the land owner is given full opportunity to interpose any defense and litigate the right of the plaintiff to maintain the proceedings. Due process of law is

thus provided for and the procedure prescribed in the Highway Law does not contravene the Constitution. *County of Orange v. Ellsworth*, 98 App. Div. 275, 90 N. Y. Supp. 576 (1904).

**Sufficiency of petition.** The objection that the petition in a proceeding instituted under this chapter failed to allege that the proceeding was authorized by the board of supervisors is not tenable as a preliminary objection, where the petition avers "that the preliminary steps required by law have been taken." Such objection must be raised by answer. *County of Orange v. Ellsworth*, 98 App. Div. 275, 90 N. Y. Supp. 576 (1904).

**General appearance of defendant confers jurisdiction of his person upon the court, and is a waiver of any question as to the sufficiency of the published notice.** *County of Orange v. Ellsworth*, 98 App. Div. 275, 90 N. Y. Supp. 576 (1904).

§ 151. **Commissioners to be appointed.**— Upon such presentation, such court shall, after hearing any person owning or claiming an interest in the lands to be acquired who may appear, appoint three disinterested persons as commissioners. And in case a commissioner shall at any time decline to serve, or shall die, or for any cause become disqualified or disabled from serving as such, the said court, at a similar special term, may, upon similar notice, application and hearing, and upon such notice to the land owners as the court may prescribe, appoint another person, similarly qualified, to fill the vacancy caused thereby.

**Derivation.** This section is taken from L. 1901, chap. 240, § 4.

§152. **Duties of commissioners.**— The said commissioners shall take the oath of office prescribed by the constitution, which oath shall be filed in the office of the county clerk of the county. The commissioners shall, with all reasonable diligence, proceed to examine such highways and lands to be acquired and may enter upon such lands for such purpose. Said commissioners shall cause a notice to be published in two such newspapers as aforesaid, once each week for two weeks successively next preceding the day of meeting mentioned in such notice, that at a stated time and place within such county they will meet for the purpose of hearing the parties claiming an interest in the damages to be awarded for the lands to be taken for such highways. Said notice shall also state the fact that a map or maps showing the land to be acquired has been filed in the county clerk's office. At the time and place of said meeting and at any adjournment thereof which said commissioners shall publicly make, they shall hear

the proofs and allegations of all interested parties. They may adjourn the proceedings before them from time to time, issue subpoenas or administer oaths in such proceedings; and shall keep minutes of their proceedings and reduce to writing all oral evidence given before them. They shall thereafter make and sign a report in writing, in which they shall assess, allow and state the amount of damages to be sustained by the owners of the several lots, pieces or parcels of land to be taken for the purposes aforesaid. Such report shall contain the names of the owners of any parcel of land to be acquired as aforesaid, except that in case the commissioners are unable to ascertain the names of such owners, they may in place of the names of such undiscovered parties insert the words "unknown owners," in their report. The said commissioners shall file their said report, together with the minutes of their proceedings, in the office of county clerk of such county. After said report shall have been completed and filed as aforesaid, the commissioners shall, after publishing a notice in like manner as that provided in section one hundred and fifty-two, apply to the county court of the county or to the supreme court, at a special term thereof to be held in the judicial department in which said county is located, to have the said report confirmed. If no sufficient reason to the contrary shall appear, the court shall confirm said report. Otherwise it may refer the same back to the said commissioners for revision or correction; and after such revision or correction the same proceedings shall be taken as are hereinbefore provided for, and the commissioners shall in the same manner make renewed application for the confirmation of such report, and the court shall thereupon confirm or refer back the said report, and such proceedings shall be repeated until a report shall be presented which shall be confirmed by the said court.

**Derivation.** This section is derived from L. 1901, chap. 240, § 5.

§ 153. **County treasurer to pay awards.**— Within six months after the report of said commissioners shall be confirmed as aforesaid, the county treasurer of such county shall pay to the persons named therein the amounts awarded to them for damages with six per centum interest thereon from the day of the confirmation of said report. Such amounts with interest and the amounts paid in pursuance of this article shall be a county charge

and shall be paid by the county treasurer, in case of purchase upon requisition of the chairman of the board of supervisors of said county, or by any member or committee thereof designated for that purpose by said board and in case of a petition for the acquisition of such lands, upon service of a certified copy of the order confirming such awards. In case there are unknown owners, to whom the award is made in said report, the said county treasurer shall deposit the amounts awarded to them with like interest in some trust company or bank in such manner as the said court shall in the order of confirmation direct, such amount to be paid out upon the application of said unknown owners when discovered. From the date of the confirmation of such report by the order of the said court the title of all the lands therein designated shall vest in said county for the purposes of a highway forever.

*Derivation.* This section is derived from L. 1901, chap. 240, § 6.

§ 154. *Costs; commissioners' fees.*—In all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be a county charge in the first instance, and be paid by the county treasurer as hereinbefore provided, except when reassessment of damages shall be had on the application of the party for whom damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment, and when application shall be made by two or more persons for reassessment of damages all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered by action. Each commissioner appointed by the court as provided in this article for each full day necessarily employed as such, shall be entitled to the sum of six dollars and his necessary expenses. The amount of compensation to which such commissioners are entitled shall be determined by the court in which the proceeding is pending, upon verified accounts presented by such commissioners, stating in detail the number of hours necessarily employed in the discharge of their duties, and the nature of the services rendered. The audit and determination of the courts as to the amount justly due shall be final.

*Derivation.* This section is derived from L. 1901, chap. 240, § 8, as amended by L. 1902, chap. 510.



§ 155. Land may be sold or leased; disposition of proceeds.— Any lands acquired by purchase or condemnation, for the purpose of obtaining gravel, stone or other materials, for the construction or maintenance of highways improved or constructed as provided in this article, or required for spoil banks, may be sold or leased by the board of supervisors of any county, when no longer needed for any of such purposes. The proceeds thereof shall be paid into the county treasury and shall be retained therein as a separate fund available for the construction or maintenance of highways improved or constructed under this article.

**Derivation.** This section is derived from L. 1901, chap. 240, § 8, as added by L. 1902, chap. 510.

§ 156. Application of provisions of labor law.— The provisions of section three of the labor law, as amended by chapter five hundred and six of the laws of nineteen hundred and six, which except from the provisions of that section labor performed in the construction, maintenance and repair of highways outside the limits of cities and villages, shall apply to the construction, improvement and maintenance of state and county highways as provided in this chapter.

**Derivation.** This section is a substitute for L. 1898, chap. 115, § 18, as renumbered and amended by L. 1907, chap. 717.

§ 157. Highways and bridges on Indian reservations.— When any portion of a county highway designated for improvement or construction in a county, as provided in this article, is located on an Indian reservation, the entire cost of the improvement or construction of such portion shall be paid by the state in the same manner as the state's share of the cost of such county highway, out of any specific appropriation made available for the construction or improvement of county highways. The commission shall have exclusive supervision and control of all bridges constructed or to be constructed by the state on any Indian reservation, and may make and enforce such reasonable rules and regulations concerning their use, as it shall deem necessary.

**Derivation.** This section is new.

**ARTICLE VII.****Maintenance of State and County Highways.**

- Section 170. Commission to provide for maintenance and repair.  
171. Appropriations by state; apportionment of moneys.  
172. Cost to town for maintenance of state and county highways.  
173. Disbursement of maintenance funds.  
174. Reports of county treasurer.  
175. Compensation of town superintendents.  
176. Liability of state for damages.  
177. Maintenance of state and county highways in villages.  
178. State to share expense of maintaining certain county roads  
179. Sprinkling; removal of filth and refuse.

**Section 170. Commission to provide for maintenance and repair.**

— The maintenance and repair of state and county highways, exclusive however of the cost of maintaining and repairing bridges having a span of five feet or over, shall be under the direct supervision and control of the commission and they shall be responsible therefor. The commission shall have the power

1. To adopt proper rules and regulations therefor and the work shall be performed by the town or the district or county superintendents as therein provided and in case the commission is unable to thus secure the proper performance of said work they shall have the power to contract for any necessary repair and likewise to provide for the due supervision of said work.

2. To purchase materials for such maintenance and repair, and contract for the delivery thereof at convenient intervals along such highways.

3. To provide for a system of patrol of such highways, or adopt such other system as may seem expedient so that each section of such highways shall be under constant observation, and be effectively and economically preserved, maintained and repaired.

**Derivation.** This section is a substitute for that part of L. 1898, chap. 115, § 12, as amended by L. 1907, chap. 717, which provides as follows: "The state engineer and surveyor shall maintain such highways or sections thereof after their completion and keep the same in repair; exclusive, however, of the cost of maintaining and repairing bridges having a span of five feet or over which shall continue to be a town charge; he may contract with the county or town in which such improved highways or section thereof

is situated, for the maintenance and repair of such highway or section thereof, under his direction; and if such county or town decline to contract or fail to comply with the terms of its contract, or in the opinion of the state engineer and surveyor is not able to make an economical or satisfactory contract, then the state engineer and surveyor shall contract with some person, firm or corporation or shall himself provide for such maintenance and repair."

**Responsibility for maintenance.** By this section the commission is made directly responsible for the maintenance and repair of State and county highways. It is intended that this important work should be under the direct supervision and control of the commission. It is also intended that, if possible to secure a proper performance of the work, it should be performed by the town or the district or county superintendents subject to rules and regulations to be prescribed by the commission. The commission will not attempt the work by contract unless it is clearly apparent that it cannot be properly performed by and under the direction of the local officers. The commission is authorized to expend moneys appropriated for maintenance of State and county highways in the purchase of material which is to be so placed as to be readily available for the work of maintenance and repair.

**Patrol system.** The joint highway committee in formulating subdivision 3 of this section had in mind the creation of a system of patrolling State and county highways so as to keep under constant observation every part and section of them, so that they may be effectively and economically maintained and preserved. It is assumed that the commission in completing its organization will take some action toward creating this system.

**Orange County Act.** The special law (L. 1901, chap. 83) providing for the construction and maintenance of highways in the county of Orange is not repealed by the provision of this section, relative to the maintenance and repair of State and county highways. Matter of Business Men's Association, 54 Misc. 13, 103 N. Y. Supp. 843 (1907).

§ 171. Appropriations by state; apportionment of moneys.— There shall be annually appropriated for the maintenance and repair of state and county highways an amount sufficient to provide therefor, based upon the estimates prepared and submitted by the commission to the legislature as provided in section twenty-one of this chapter. Not less than ninety per centum of the amount so appropriated shall be apportioned by the commission each year among the counties and the several towns therein in accordance with the proportion which the amount to be apportioned bears to the total amount of such estimates. The comptroller, upon the requisition of the commission, shall draw his warrant upon the state treasurer in favor of the county treasurer of the county in which the state or county highways are located, for an amount which shall not be in excess of the total amount apportioned by the commission to all the towns in such county. The

moneys so paid shall be deposited by the county treasurer to the credit of the fund for the maintenance of state and county highways in the several towns of the county. Not more than ten per centum of the amount so appropriated each year may be reserved by the commission for the repair or rebuilding of a state or county highway which shall at any time be damaged or destroyed by the elements or otherwise, which shall be paid by the state treasurer upon the warrant of the comptroller drawn upon the requisition of the commission issued when required for such purposes.

**Derivation.** This section is new.

**Apportionment.** Section 21 of the Highway Law requires an inspection of State and county highways either by the division engineer or the district or county superintendent of the district or county where the highway is located. Such officers are required by that section to estimate the probable cost of the repair and maintenance of the highways inspected. The commission is then authorized to revise the estimate and report to the Legislature the amount required for the proper repair and maintenance of State and county highways. It is this estimate which is made the basis of the appropriation by the Legislature for maintenance and repair. If the whole amount estimated for is not appropriated then each county and town in which State and county highways are located are to receive a proportionate share of the amount appropriated. For instance, if in a certain county the estimated cost of repair and maintenance is \$5,000 and of the entire State \$500,000, and there is only appropriated one-half of the amount so estimated then the county would receive 90 per cent. of \$2,500, the balance being retained by the commission for emergencies. Each locality is guaranteed by this section its just proportion of the maintenance fund in much the same manner as each local school district is sure of an equitable apportionment of the common school fund.

§ 172. **Cost to town for maintenance of state and county highways.**— Each town shall pay for the maintenance and repair of state and county highways each year the sum of fifty dollars for each mile or major fraction of a mile of the total mileage of state and county highways within the town. On or before the first day of November in each year the commission shall transmit to the clerk of the board of supervisors of each county, and to the county clerk thereof, a statement specifying the number of miles of state and county highways in each town in such county and the amount which each of such towns is required to pay into the county treasury on account of the maintenance of state and county highways. The board of supervisors shall cause the amount to be paid by each town of the county to be assessed, levied and collected therein in the same manner as other town

charges, and such amount when collected shall be paid into the county treasury, to the credit of the fund for the maintenance of state and county highways in the several towns of the county.

**Derivation.** This section is derived from that part of § 12 of L. 1898, chap. 115, as amended by L. 1907, chap. 717, which reads as follows: "After acceptance the total cost to a town for the maintenance and repair of such highways in any one year, except as hereinafter provided, shall be fifty dollars in each town for each mile or fraction of a mile of such highway. On or prior to November 1st in each year, or as soon thereafter as practicable, it shall be the duty of the comptroller to transmit in connection with his other notices of taxes to the clerk of the board of supervisors and to the county clerk a notice setting forth the amount which each of the towns in each county is required to raise and pay into the State treasury on account of the maintenance of improved highways; and it shall be the duty of the board of supervisors to provide for the levy of the respective amounts in the several towns and to require the payment of such amounts by the several town collectors to the county treasurer of the county; and the said aggregate amount shall be paid over by the county treasurer to the comptroller for deposit with the state treasurer in accordance with the provisions of the statute requiring him to remit other state taxes to the state treasurer." The important change consists in the guaranty to each locality of its own money, and its proportion of the amounts appropriated by the preceding Legislature.

**Levy upon town.** The amount to be paid by each town under this section is to be determined by the number of miles of State and county highways therein, as appears from the statement submitted by the commission to the clerk of the board of supervisors. The mileage must be that of State and county highways which have been actually completed and accepted as provided in article 6. The amount as so determined is arbitrarily charged against the town without audit by the town board and must be included in the abstract of charges against the town and levied in the same manner as all other town charges.

The money when collected will be paid to the supervisor and by him turned over to the county treasurer as provided in the above section. The Tax Law, § 56, subd. 3, requires the collector's tax warrant to command the collector "to pay to the supervisor of the town, all the moneys levied therein to defray any other town expenses or charges."

§ 173. Disbursement of maintenance funds.— The amount apportioned by the commission for the maintenance and repair of state and county highways in each town together with the amount paid by each town therefor shall be expended for the repair and maintenance of such highways in such town. The county treasurer shall pay out the moneys received by him as provided in this article upon the written order of the commission. Such order shall be issued upon vouchers duly presented to the com-

mission in the form to be prescribed by them. The commission may adopt rules and regulations providing for the presentation and payment of accounts for maintenance and repair.

**Derivation.** This section is new.

The expenditure of the money available for the repair and maintenance of State and county highways is to be expended in the town according to the requirements of such highways therein. It is made the duty of the commission, by section 171, to apportion the money appropriated by the State among the counties and the several towns therein. This apportionment is to be in accordance with estimates made as to the cost of the repairs needed in the several towns. The town's share of the cost, that is, the \$50 a mile required by section 172, must be entirely expended within the town.

Accounts for the work performed are to be presented to the commission and the commission issues its order upon the county treasurer for the payment of the amount due the person performing the work or furnishing the required materials.

**§ 174. Reports of county treasurer.**— The county treasurer shall report to the commission monthly or oftener, if required by the commission, the amount received by him on account of the maintenance and repair of state and county highways in the several towns in his county and the expenditures made by him out of such moneys. The form and contents of such report shall be prescribed by the commission.

**Derivation.** This section is new.

The county treasurers will be required to keep a strict and accurate account of the moneys received and expended by them on account of the repair and maintenance of State and county highways. In making such expenditures they are responsible to the commission and are subject to the commission's control.

**§. 175. Compensation of town superintendents.**— If a town superintendent shall be directed by the commission to perform services in respect to the maintenance and repair of state and county highways within his town his compensation therefor shall be paid out of the moneys set apart as provided in this article for such maintenance and repair. Such compensation shall be fixed by the commission but shall in no case exceed the amount fixed by the town board as compensation for his services performed for the town under this chapter, and in rendering his monthly bill to the supervisor, and his annual bill to the town board, no charge shall be made against the town for an expense or per diem charge upon any date for which an audit shall have been allowed by

the state commission. And said state commission shall make proper rules and regulations to carry into effect this provision and to furnish to the town board prior to the annual audit day due information as to the dates, compensation and expenses allowed by them to said town superintendent from the state repair fund.

**Derivation.** This section is new.

**Compensation of town superintendent** is fixed by the town board and is not to be less than two nor more than five dollars per day. See section 45, *ante*. This section makes the compensation of the town superintendent for services rendered in respect to the maintenance and repair of State and county highways, a charge upon the funds available for such purpose. The commission is authorized to fix the compensation of such town superintendents and may make it less than that fixed by the town board but may not make it more. The commission will probably provide for a report to the town board of each town of the amount paid to the town superintendent on account of the maintenance and repair of State and county highways so as to enable the town board to ascertain the portion of the superintendent's time which was devoted to the maintenance of State and county highways.

§ 176. **Liability of state for damages.**—The state shall not be liable for damages suffered by any person from defects in state and county highways, but the liability for such damages shall remain as now provided by law, notwithstanding the construction or improvement and maintenance of such highways by the state under this chapter.

**Derivation.** This section is taken from that part of section 8 of L. 1898, chap. 115, as amended by L. 1907, chap. 717, which provided in effect that the State shall not be liable for damages suffered by the construction or improvement of a highway under that act.

**Liability of town for defects.** Under section 74 a town is liable for injuries sustained "by reason of any defect in its highways or bridges existing because of the neglect of any town superintendent of such town." It was intended by section 176 to retain the same liability on the part of the town in respect to a state or county highway as would exist had the highway not been improved or constructed by the State or jointly by State, county and town. If the defect exists because of the neglect of some other officer than the town superintendent, where the commission has been compelled to contract for the repair of the highway as provided in subdivision 1 of section 170, there is probably no liability on the part of the town. The theory of the law is that the local officers shall determine as to the character and necessity of the repairs to be made upon State and county highways subject to the supervision of the commission and rules and regulations adopted by it. So far as the town superintendent exercises his control over State and county highways and makes repairs thereto, the town's liability will remain to the same extent as though the highways had remained town highways.

§ 177. **Maintenance of state and county highways in villages.**—Any portion of a state or county highway constructed or improved within the limits of an incorporated village, as provided in this chapter, shall be maintained and kept in repair by the board of trustees at the expense of the village in accordance with the rules and regulations of the commission under the supervision and direction of the district or county superintendent.

**Derivation.** This section is derived from the last sentence of § 15, of L. 1898, chap. 115, as amended by L. 1907, chap. 717.

**State and county highways in villages.** Section 137 of this chapter authorizes the construction of a State and county highway through the village in the same manner as outside thereof, and section 138 authorizes the construction of a highway through a village connecting with county highways already constructed under the former act. It is these highways so constructed which are to be maintained and kept in repair at the expense of the village.

§ 178. **State to share expense of maintaining certain county roads.**—Whenever any county has heretofore constructed, under a general or special law, other than this chapter, a county road or roads, without expense to the state, the state shall be liable to annually contribute toward the expense of maintaining such road or roads fifty per centum of the amount appropriated by such county for the maintenance of such road or roads during the preceding year, unless provision be otherwise made for such maintenance as provided in this section. The clerk of the board of supervisors of a county entitled to a contribution from the state toward the maintenance of its roads under this section shall annually, on or before the first day of January, transmit to the state comptroller a statement certified by him and signed and verified by the chairman of such board, stating the amount appropriated by the board of supervisors of such county for the maintenance of such county road or roads during the preceding year. The comptroller shall draw his warrant upon the state treasurer in favor of the treasurer of such county, for an amount equal to fifty per centum of the amount so appropriated. Such money shall be applicable to the repair and permanent improvement of such county road or roads, and shall be expended in the same manner as money appropriated by the county for such purpose. The sum paid by the state to any county by virtue of this section shall not exceed, in any one year, one-tenth of one per centum of the taxable property of such county. The commission may at any



time inspect such county roads and if they determine that they are of sufficient importance and are properly constructed, they shall make an order directing that such county roads become a part of the system of county highways in such county, and thereafter such roads shall be maintained as county highways in the manner provided in this article, and the state shall cease to contribute for the maintenance thereof as provided in this section. Such order shall be served upon the chairman of the board of supervisors and a certified copy thereof shall be filed in the office of the county clerk and one in the office of the state comptroller.

**Derivation.** This section is taken from former Highway Law, section 53b, as added by L. 1903, chap. 269. Under the former law the State was liable annually contribute toward the expense of maintaining a county road which had been constructed entirely at the expense of a county upon the submission of a verified statement showing the amount so expended. This liability was absolute. Under the present law the discretion is conferred upon the commission to annex such county roads.

**§ 179. Sprinkling; removal of filth and refuse.**—Upon petition signed by a majority of the taxpayers owning property abutting upon an improved state or county highway and filed with the town clerk, the town board may set aside any section of such highway outside of a village and contract for the sprinkling of the roadbed with water and also contract for the removal of filth and refuse therefrom. No such contract shall be entered into unless previously approved by the county superintendent. The amount of any such contract so entered into shall be assessed upon the property abutting upon such section in the proportion which the frontage of each parcel thereof bears to the length of the section exclusive of intersecting highways. Such assessment shall be made, levied and collected in the same general manner, and at the same time and by the same officers as the town taxes of said town are assessed, levied and collected.

**Derivation.** This section is new.

**Time of taking effect.** The provisions of this section take effect on May 19, 1908, pursuant to section 317, subdivision 3.

**ARTICLE VIII.****Laying Out, Altering and Discontinuing Highways; Private Roads.**

- Section 190. Survey for the laying out of a highway.  
191. Highways by dedication.  
192. Application.  
193. Application for condemnation commissioners.  
194. Appointment of condemnation commissioners and their duties.  
195. Notice of meeting.  
196. Decision of condemnation commissioners in favor of application.  
197. Damages in certain cases, how estimated.  
198. Decision of condemnation commissioners denying application.  
199. Motion to confirm, vacate or modify.  
200. Limitations upon laying out highways.  
201. Laying out highways through burying-grounds.  
202. Costs, by whom paid.  
203. Damages assessed and costs to be audited.  
204. When officers of different towns disagree about highway.  
205. Difference about improvements.  
206. Highway in two or more towns.  
207. Laying out, dividing and maintaining highway upon town line.  
208. Final determination, how carried out.  
209. Highways by use.  
210. Fences to be removed.  
211. Private road.  
212. Jury to determine necessity and assess damages.  
213. Copy application and notice delivered to applicant.  
214. Copy and notice to be served.  
215. List of jurors.  
216. Names struck off.  
217. Place of meeting.  
218. Jury to determine and assess damages.  
219. Their verdict.  
220. Value of highway discontinued.  
221. Papers to be recorded in town clerk's office.  
222. Damages to be paid before opening the road.  
223. Fees of officers.  
224. Motion to confirm, vacate or modify.  
225. Costs of new hearing.  
226. For what purpose private road to be used.  
227. Highways or roads along division lines.  
228. Adjournments.  
229. Widening roads, petition.  
230. Powers and duties of commissioners.  
231. Notice of decision to supervisors.  
232. Widening, how constructed.  
233. Actions to compel widening, how affected by petition.  
234. Highways abandoned.

- Section 235. Highways in lands acquired by the United States, for fortification purposes, deemed abandoned.
236. Discontinuance of highway.
237. Description to be recorded.
238. Damages caused by discontinuance.
239. Papers, where filed.
240. Costs of motion.

§ 190. **Survey for the laying out of a highway.**—Whenever the town superintendent shall lay out any highway, either upon application to him or otherwise, he shall notify the district or county superintendent, whose duty it shall be to either make a survey, or cause the same to be made, and the town superintendent shall incorporate the survey in an order to be signed by him, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same.

**Derivation.** This section is derived from section 81 of the former Highway Law, modified so as to provide for survey to be made by the district or county superintendent.

This section applies to a highway laid out by the town superintendent (1) where lands have been dedicated for highway purposes as provided in section 191; (2) where application has been made to him for laying out a highway upon a release from all damages by the owners of the lands taken or affected thereby as provided in section 191; and (3) where proceedings have been taken as provided in section 193 for the laying out of a highway, and commissioners have been appointed and have determined the necessity of the highway and assessed the damages. Section 208 provides that every decision of commissioners shall be carried out by the town superintendent of the town, the same as if they had made an order to that effect. This would seem to require the town superintendent to incorporate in an order to be entered by him laying out the highway, a survey of the highway as determined upon by the commissioners appointed in the proceedings.

Under section 47, subdivision 8, the town superintendent is required to cause such highways as shall have been laid out but not sufficiently described, and such as shall have been used for twenty years but not recorded, to be ascertained, described and entered upon record in the town clerk's office.

The board of supervisors may authorize and direct a town superintendent "to cause a survey to be made, at the expense of the town of any or all of the highways therein, and to make or complete a systematic record thereof or to otherwise, collate and rearrange existing records of highways, and to correct and verify the same by new surveys and to establish the location of highways by suitable monuments." County Law, § 72.

**Sufficiency of survey.** The survey or description of the highway laid out, included in or made part of the order should be definite and certain. It should clearly specify the highway as to line and width. If there is no width expressed in it, and it is wholly uncertain both as to starting point and terminus, it is insufficient. *People ex rel. Waters v. Diver*, 19 Hun,

263 (1879). The omission to incorporate a survey in the order, or to make it a part of it, is fatal. *Pratt v. People*, 13 Hun, 664 (1878). The survey, to be sufficient, should show distinctly the line of the proposed road so that persons through whose lands the road is to be laid out, and others interested, can determine its route; there must be no uncertainty in the description of the property to be taken; the description should be such that from it alone, without resort to other papers, the road could be laid out. *Matter of De Camp*, 19 App. Div. 564, 46 N. Y. Supp. 293 (1897); *Pratt v. People*, 13 Hun, 664 (1878). The objects at each end of the line of the highway, as pointed out in the record, will direct the course of the line, despite the fact that the direction of the compass between them as given in the description, is inaccurate. *Johnson v. Loveless*, 18 Wkly. Dig. 49 (1883).

It has been held that it is sufficient to run a single line as the center of the highway, with definite points of starting and ending, since the width being prescribed by statute the boundaries of the highway would be a matter of simple calculation. *People ex rel. Hawver v. Commissioners of Highways of Redhook*, 13 Wend. 310 (1835); *People ex rel. McFarland v. Commissioners of Highways of Salem*, 1 Cow. 23 (1823). But the present section contemplates a survey of the boundaries of the highways in the manner in which a practical civil engineer would make it. It is made the duty of the county or district superintendent to provide such a survey, the intent being to require more accuracy in making such survey than has been required under the former law.

The objection to the order of the commissioners, laying out the road, that it did not incorporate the survey, is of no force. Where the order referred to the survey in direct terms, and the survey was attached to the order, and was recorded as part of it, it was held, in legal effect, to be incorporated into the order and to constitute a part of it; the purpose of the statute, which was to secure a record of the locality of the highway, was fully answered; and in such a case a mere informality will not be deemed fatal, there being a substantial compliance with the requirements of the law. *Van Bergen v. Bradley*, 36 N. Y. 316 (1867).

A writing, which although it does not contain a formal order laying out a highway, purports to be a survey of a road, describes the center line, and states where the road is to commence and terminate, and which writing is filed with the town clerk and made a part of the records of the town, is to be considered as intended by the commissioners as a survey and order establishing the road, and is a substantial compliance with the section requiring incorporation of an order in the survey. *Tucker v. Rankin*, 15 Barb. 471 (1853). Where the recital of the laying out of the highway and the survey, though dated several months before, are recorded immediately after the order in the book of town records, and the order purports to accord with a survey and both papers describe the same highway, the statute requiring the survey to be incorporated in the order is substantially complied with. *McCarthy v. Whalen*, 19 Hun, 503 (1880); affirmed, 87 N. Y. 148.

**In laying out a highway** the superintendent exercises a special and limited jurisdiction; and although it may be presumed until the contrary appears that he has acted legally, his acts may be impeached by showing that he exceeded his powers. *Ex parte Clapper*, 3 Hill, 458 (1842). Town superintendents of highways may, upon their own motion, and without any applica-

tion therefor, lay out a highway. *Marble v. Whitney*, 28 N. Y. 297 (1863); *People ex rel. Aspinwall v. Supervisors of Richmond*, 20 N. Y. 252 (1859); *Gould v. Glass*, 19 Barb. 179 (1855). But see *Harrington v. People*, 6 Barb. 608 (1849).

A record, purporting to be the record of a highway laid out by the town superintendent, which fails to show that jurisdiction was acquired, cannot be helped out by intendment or presumption; and the subsequent action of the superintendent in making a survey and description of the alleged highway was void, and the omission to take an appeal therefrom does not preclude the plaintiff from contesting the existence of a legal highway. *Miller v. Brown*, 56 N. Y. 383 (1874).

The clerk's act in recording an order of a town superintendent is ministerial. He has no discretion in its performance. He cannot refuse to file and record the order because it is improperly executed. *People v. Collins*, 7 Johns. 549 (1811).

§ 191. **Highways by dedication.**— Whenever land is dedicated to a town for highway purposes therein, the town superintendent may with the consent of the town board, either with or without a written application therefor, and without expense to the town, make an order laying out such highway, upon filing and recording in the town clerk's office with such order a release of the land from the owner thereof. A highway so laid out must not be less than two rods in width. Section two hundred does not apply to a highway by dedication. Such town superintendent may also, upon written application and with the written consent of the town board, make an order laying out or altering a highway, or discontinuing a highway, which has become useless since it was laid out, upon filing and recording in the town clerk's office, with such application, consent and order, a release from all damages from the owners of lands taken or affected thereby, when the consideration for such release, as agreed upon between such town superintendent, and owner or owners, shall not in any one case, from any one claimant, exceed one hundred dollars, and from all claimants five hundred dollars. An order of the town superintendent, as herein provided, shall be final.

**Derivation.** This section is derived from former Highway Law, section 80, as amended by L. 1904, chap. 384.

**Object of section.** This section provides for two methods of laying out a highway; one when land is dedicated and a release thereof is duly executed by the owner; the other upon written application of taxpayers in the town upon a release from all damages executed by the owners of the lands to be taken. A highway cannot be laid out, altered, or discontinued by the town superintendent under this section where the damages agreed upon exceed

\$100 to a single claimant and \$500 to all claimants. Where the amount of damages to be paid the owners affected exceeds the sums specified, proceedings must be taken as provided in subsequent sections of this article.

**Width of highways.** A highway dedicated by the owner of the land through which it runs as provided in this section, must not be less than two rods in width. By section 200 it is provided that no highway shall be laid out "less than 3 rods in width." This restriction applies to highways laid out by the town superintendent upon the written application and a release of damages by owners affected as provided in this section.

**Application to the town superintendent for an order laying out or altering a highway or discontinuing a highway,** as provided in this section, may be made by any person or corporation residing in the town liable to the payment of highway taxes. Section 192 applies to such an application.

**Consent of town board.** The consent of the town board is required before the town superintendent may make an order laying out a highway which has been dedicated by the owner of the land through which it runs. This consent was not required under the former law.

**Creation of public highways.** Aside from the method prescribed by this article of the Highway Law, public highways may be created in the following ways: (1) By prescription, as where land has been used by the public as a highway for twenty years with the knowledge, but without the consent, of the owners; (2) by dedication through offer and implied acceptance, as where the owner throws open his lands intending to dedicate it to the public and the latter use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment; (3) by dedication through offer and actual acceptance, as where the owner throws open his land and by acts or words invites acceptance, and the public authorities in charge formally or in terms accept it as a highway. *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892). Where land is dedicated in either of such ways the town superintendent may formally accept the same, and, if consented to by the town board, may enter an order laying out a highway upon securing and filing and recording a release of such land by the owner. Without the execution of a written release of the land by the owner thereof the superintendent would not be authorized to enter his order formally laying out the highway. But it does not follow that there can be no dedication and that the public would have no rights in the lands dedicated without such release.

**What constitutes dedication.** The above section provides that "whenever land is dedicated to a town for highway purposes" the town superintendent may lay out the highway with the consent of the town board. This formal action may only be taken when the land is dedicated and after a release duly executed by the owner thereof. It is, therefore, important to ascertain what constitutes a dedication.

Dedication may be implied from the use of the land for highway purposes by the public without objection on the part of the owner for a considerable period of time. User for any prescribed period of time is not essential. If the public use is uninterrupted for twenty years or more the land becomes a highway by prescription, and this principle is declared in section 209 of this chapter. But such a highway does not necessarily become such by dedication, nor is it necessary that the use shall continue for such period of twenty

years in order to constitute a dedication. There is no definite and well established principle governing the period of time required to establish an implied dedication. Authorities differ as to requisite time of user required. *Wiggins v. Tallmadge*, 11 Barb. 457 (1851).

No specific length of time is sufficient to establish the fact of a dedication to the public. There may be sufficient acts within two years, or even less, to estop the owner from asserting his final dominion over the property and to entitle the public to its use; but the acts of declaration which are to have this effect must be unmistakable in their purpose and decisive in their character. *Carpenter v. Gwynn*, 35 Barb. 395 (1861).

The user ought to be for such a length of time that the public accommodation and private rights might be affected by a revocation. *McMannis v. Butler*, 51 Barb. 436 (1868). But it is not necessary that the user shall have been long enough to establish a right by prescription. *Ward v. Davis*, 3 Sand. 502 (1850).

To establish the dedication of land for highway purposes it is not necessary to show that the public have been in uninterrupted use of it for a length of time that would authorize the presumption of a grant of an easement. The doctrine of prescription involves the presumption of a grant, and in the case of the public there can be no grantee. The public may use as a thoroughfare the land of an individual for a period short of twenty years with the assent of the owner of the soil, and a dedication of the public right of way may be presumed. *Clements v. Village of West Troy*, 10 How. Pr. 199 (1854). Twenty years' uninterrupted use will create the presumption of dedication, but a much shorter period will be sufficient where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by a public use. *Denning v. Roome*, 6 Wend. 651 (1831); *Colden v. Thurbur*, 2 Johns. 424 (1807). A user for twenty years is not requisite to establish a dedication to the public use of a street or highway, and use for six or eight years may, under certain circumstances, be sufficient. *Post v. Pearsall*, 22 Wend. 425, 450 (1839). User for a short time, express and unequivocal, treating the strip of land as a street or highway, is sufficient. *Bissell v. N. Y. C. R. R. Co.*, 26 Barb. 630 (1858); *Chapman v. Swan*, 65 Barb. 210 (1865).

If there be no other evidence of a grant or dedication than the presumption arising from the acquiescence on the part of the owner in the free use and enjoyment of the way as a public road the period of twenty years, applicable to incorporeal rights, would be required as being the usual period of limitation. *Gould v. Glass*, 19 Barb. 179 (1855); *Vandemark v. Porter*, 40 Hun, 397 (1896); *Pearsall v. Post*, 20 Wend. 111 (1838); 22 Wend. 450 (1839). When the twenty years have run the right of the public is perfect without regard to the mode in which the acquiescence of the owner of the land has been manifested. *Chapman v. Swan*, 65 Barb. 210 (1865).

Although the owner of land may not dedicate it for a public highway and may not intend or assent that it shall become such, yet if he permits it to be used in that way for twenty years it would be deemed a public highway and he will not be permitted to question the public right. *Spier v. Town of New Utrecht*, 121 N. Y. 420 (1890).

No deed or writing is necessary to constitute the dedication; neither is

any particular form or ceremony to be observed. All that is required is the assent of the owner and the use of the land by the public for the purposes intended. *Gould v. Glass*, 19 Barb. 179 (1855). A valid dedication may be made by a single act if positive and unequivocal in its nature. *Ward v. Davis*, 3 Sand. 502 (1850). The question as to whether a public highway has been created by dedication and acceptance is one of fact and a question for the jury. *Flack v. Village of Green Island*, 122 N. Y. 107 (1890); *Matter of Hunter*, 163 N. Y. 542 (1900); *Newton v. City of Dunkirk*, 121 App. Div. 296, 106 N. Y. Supp. 124 (1907); *Porter v. Village of Attica*, 33 Hun, 605 (1884); *Matter of Freholders of Montezuma*, 38 N. Y. St. Rep. 970, 14 N. Y. Supp. 845 (1891).

As to sufficiency of evidence to support a dedication or an acceptance, see *Iselin v. Starin*, 144 N. Y. 453 (1895); *Rozell v. Andrews*, 103 N. Y. 150 (1886); *Cook v. Harris*, 61 N. Y. 448 (1875); *Eckerson v. Village of Haverstraw*, 6 App. Div. 102, 39 N. Y. Supp. 635 (1896); *Wiggins v. Tallmadge*, 11 Barb. 457 (1851); *Bridges v. Wyckoff*, 67 N. Y. 130 (1876); *Clements v. Village of West Troy*, 16 Barb. 251 (1853); *McVee v. City of Watertown*, 92 Hun, 306, 36 N. Y. Supp. 870 (1895); *Carpenter v. Gwynn*, 35 Barb. 395 (1861).

**Dedication of lands of residence park association for highways.** The leasing for a long term of years of lots laid out on a map or plan of lands of a camp meeting and summer residence park association showing such lots, and roads and streets to be used for access thereto, constitutes a dedication of land in such streets and roads to the use of the lessees, and the association cannot maintain an action of trespass against a person using a road for access to the premises of a lessee for the purpose of delivering merchandise and supplies. *Thousand Island Park Association v. Tucker*, 173 N. Y. 203, reversing 59 App. Div. 627, 69 N. Y. Supp. 1149 (1903).

**Assent of owner.** An absolute and final dedication of lands to a public use, can only be made by the owner of an absolute fee. *Ward v. Davis*, 3 Sand. 502 (1850). Assent of the owner to the dedication must be a free and voluntary act. If it be extorted by force, or made under a mistake or misapprehension of facts, it is not a free and voluntary act, and cannot be tortured into an express dedication. *Gould v. Glass*, 19 Barb. 179 (1855); *Badeau v. Mead*, 14 Barb. 328 (1852). Intention to dedicate must be clear. *Wiggins v. Tallmadge*, 11 Barb. 457 (1851).

**Formal dedication.** If it is attempted to establish a formal dedication of a highway there must be proof of acceptance by some formal and unambiguous action on the part of the local authorities having the power to accept, and showing unmistakably an intention to accept the land for such purpose. *People v. Underhill*, 144 N. Y. 316 (1895). Where an owner of land conveys a portion thereof under an agreement to open a highway along the same, and such a highway is accordingly opened, such covenant is evidence of an intention to dedicate such highway. *Newman v. Nellis*, 97 N. Y. 285 (1884).

**Proof of acceptance.** To constitute a public highway by dedication there must not only be an absolute dedication, that is, a setting apart and surrender to the use of the public, but there must also be an acceptance by user. *People v. Underhill*, 144 N. Y. 316 (1895); *Niagara Falls Susp. Bridge Co. v. Bachman*, 66 N. Y. 261 (1876); *Spier v. Town of New Utrecht*,



121 N. Y. 420 (1890); *Holdane v. Village of Cold Spring*, 21 N. Y. 474 (1860); *Badeau v. Mead*, 14 Barb. 328 (1852); *Matter of Fox Street*, 54 App. Div. 479, 67 N. Y. Supp. 57 (1900). The acceptance by user must be shown by more than an occasional use by part of the public; the use must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. *Spier v. Town of New Utrecht*, 121 N. Y. 420 (1890).

The intent of the owner to give must be followed by an abandonment of his exclusive right to the enjoyment of the land, and the intent to accept, in the absence of any formal act of acceptance, must be shown by the use and appropriation of the land as a highway. *Flack v. Village of Green Island*, 122 N. Y. 107 (1890). A formal resolution of the local authorities is unnecessary, but any official act on their part which treats it as a highway and shows an intention to adopt it as such is sufficient. *Matter of Hunter*, 163 N. Y. 542 (1900). The mere surveying, mapping and laying out of the tract, opening the street and selling lots upon it, do not make it a public highway; they merely import an incipient dedication. *Bissell v. N. Y. C. R. R. Co.*, 26 Barb. 630 (1858); *Matter of Oakley Avenue* 85 Hun, 446, 32 N. Y. Supp. 1146 (1895).

The acceptance may be proved by long public use, and where such is the case no formal laying out is necessary; it becomes a question of fact for the jury as to whether there has been an acceptance. *People v. Loehfelm*, 102 N. Y. 1 (1886); *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, 466 (1887); *Cook v. Harris*, 61 N. Y. 448 (1875); *People v. Lambier*, 5 Den. 9 (1847); *Gould v. Glass*, 19 Barb. 179 (1855); *Eckerson v. Village of Haverstraw*, 6 App. Div. 102, 39 N. Y. Supp. 635 (1896); *McVee v. City of Watertown*, 92 Hun, 306, 36 N. Y. Supp. 870 (1895). An immediate acceptance and use of the thing dedicated is not necessary in order to secure the rights of the public in it. The only question arising where there has been no immediate public use is as to the necessity of showing an acceptance, for the purpose of securing a protection of the public rights. *Clements v. Village of West Troy*, 10 How. Pr. 199 (1854).

A way opened by the owners of private lands, for the accommodation of the lands through which and to which it leads, and never laid out as a public road, must be deemed a private way, even if the public are permitted to travel over it, if it is not shown to have been ever dedicated to, and accepted and adopted by, the public as a public highway. *Palmer v. Palmer*, 150 N. Y. 139 (1896); *Hamilton v. Village of Owego*, 42 App. Div. 312, 59 N. Y. Supp. 103 (1899). To constitute such a public use as to show an acceptance it is not necessary that the public at large shall be entitled to it; it suffices if its advantages are meant to be and may be shared by the inhabitants, or a portion of them of the same locality. *Ward v. Davis*, 3 Sand. 502 (1850).

As to acceptance by municipality see *Raynor v. Syracuse University*, 35 Misc. 83, 71 N. Y. Supp. 293 (1901); *Rudolph v. Ackerman*, 30 Misc. 698, 64 N. Y. Supp. 460 (1900); *Clements v. Village of West Troy*, 16 Barb. 251 (1853); *Oswego v. Oswego Canal Co.*, 6 N. Y. 257 (1852). As to acceptance of dedication by legislative act see *Rudolph v. Ackerman*, 58 App. Div. 596, 69 N. Y. Supp. 68 (1901); reversing 30 Misc. 698, 64 N. Y. Supp. 460 (1900.)

Lands adjoining a public highway, lying between it and a fence, are apparently dedicated to the public use; and other construction would convert it into a trap to catch trespassers. *Cleveland v. Cleveland*, 12 Wend. 172 (1834).

**Revocation of dedication.** Where a highway has been once dedicated and accepted, the dedication may not be revoked by the owner of the land. *Cook v. Harris*, 61 N. Y. 448 (1875). But a dedication of land for use as a public highway may be revoked at any time before it has been accepted and the rights of third parties have become vested. *City of Buffalo v. D., L. & W. R. R. Co.*, 68 App. Div. 488, 74 N. Y. Supp. 343 (1902), affirmed 178 N. Y. 561.

Where a road is laid out and dedicated to public use and has been used as a highway for less than five years, and the authorities have neither accepted, opened or worked the same, the dedication may be revoked by the owner and the land does not become a public highway. *Lee v. Village of Sandy Hill*, 40 N. Y. 442 (1869); *Eckerson v. Village of Haverstraw*, 6 App. Div. 102, 39 N. Y. Supp. 635 (1896). If the dedication be not accepted within a reasonable time the owner may recall it at any time before the rights of the public have attached. What is a reasonable time must depend upon the particular facts and circumstances of each case. *Matter of Fox Street*, 54 App. Div. 479, 67 N. Y. Supp. 57 (1900); *McManus v. Butler*, 51 Barb. 436 (1868); *Bissell v. N. Y. C. R. R. Co.*, 26 Barb. 630 (1858).

An offer to dedicate may be made subject to a certain condition, and if it is accepted *cum onere*, the land becomes a highway subject to the burden; but the owner may not thereafter increase the burden or revoke the dedication, and the burden is upon him to show that the condition has not been complied with. *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892); *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122 (1882).

The town superintendent may act upon the verbal consent of the owner in laying out a highway across his lands, and though consent is revocable, it must be revoked before the road is laid out; subsequently the owner will be estopped from denying the legality of the act. If such consent has been given under a mistake of law, the party can have no relief in equity. *Marble v. Whitney*, 28 N. Y. 297 (1863).

**Release by owner.** Before the town superintendent takes any proceedings to lay out the lands dedicated as a highway, he should file and record in the town clerk's office a release of the land from the owner thereof; but the Court of Appeals has held that where the owner of land applied for and consented to the alteration of a highway which was wholly upon his farm, and himself closed a part of the highway which was abandoned, and opened and worked the new part, the failure to record a formal release did not render the order void so as to justify the invasion of the closed highway by persons having no rights except those common to the public. *Engleman v. Longhorst*, 120 N. Y. 332. Compare *people ex rel. Clark v. Commissioner of Highways of Town of Reading*, 1 T. & C. 193 (1873), where it was held that the fact the damages had neither been released nor assessed constituted a complete answer to an application for a writ of mandamus to open and improve a highway.

Where a release of lands by the owner for highway purposes though left with the clerk for filing is lost and there is no evidence of its contents, mandamus will not issue to compel the commissioners to open the highway. *People ex rel. Eastman, v. Scottt*, 75 N. Y. Supp. 410 (1902).

**Failure to record order.** Where there has been a user of a road by the public for twenty years, and it has been kept in repair or taken in charge by the public authorities, the fact that they have failed to perform their duty to record it does not change the mandate of the statute that it shall be deemed a public highway. *Lewis v. N. Y., L. E. & W. R. R. Co.*, 123 N. Y. 496 (1890).

**Closing highway.** Where an order of a town superintendent closing a portion of a highway, is filed in the town clerk's office, but is not recorded by him as required by the above section, the failure to record the order does not invalidate the proceedings of the superintendent. *People ex rel. Dinsmore v. Vandewater*, 83 App. Div. 60, 82 N. Y. Supp. 626 (1903).

Highways are laid out and discontinued by the commissioners under the regulations contained in the statute. *People ex rel. Van Kenren v. Town Auditors*, 74 N. Y. 310 (1878). Once established a highway does not cease to be such until it has been discontinued by the proper authorities. *Driggs v. Phillips*, 103 N. Y. 77 (1886). Where a highway is once shown to exist it is presumed to continue until it is shown to exist no longer. *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892); *Beckwith v. Whalen*, 65 N. Y. 322 (1875). Where a new road has been regularly laid out, it cannot be discontinued as an old one before it has been opened and used. *People ex rel. Miller v. Griswold*, 67 N. Y. 59 (1876).

A highway is subject to discontinuance though never opened where the original occasion for it has ceased, for example where another road has been opened. *People ex rel. Clark v. Town of Reading*, 1 T. & C. 193 (1873).

A town meeting has no power to discontinue a highway once established; that can be done only by the intervention of the authorities and according to the procedure prescribed by statute. *Hughes v. Bingham*, 135 N. Y. 347 (1892). A town cannot lay out a highway nor discontinue one. *Monk v. Town of New Utrecht*, 104 N. Y. 552 (1887).

A highway opened and worked for a short part of the distance only, and not opened or worked as described in the survey or in any manner on a particular portion thereof, until after the lapse of nearly fourteen years, from the time of its being laid out, ceases to be a highway for any purpose at the place it is not opened or worked. *Christy v. Newton*, 60 Barb. 332 (1871).

**Power of town superintendent in respect to laying out, etc., highway.** It is not necessary to the valid laying out of a highway that there should be a written application therefor. *McCarthy v. Whalen*, 19 Hun, 503 (1880), affirmed 87 N. Y. 148; *Gould v. Glass*, 19 Barb. 179 (1855); *People ex rel. Aspinwall v. Supervisors of Richmond*, 20 N. Y. 252 (1859). But in *Harrington v. People*, 6 Barb. 607 (1849), it is asserted that to give commissioners of highways jurisdiction of proceedings to lay out a highway, an application must be made to them in writing, by a person liable to be assessed for highway taxes.

Highway officers in laying out a highway, exercise a special and limited

jurisdiction. *Beardslee v. Dolge*, 143 N. Y. 160 (1894); *Ex parte Clapper*, 3 Hill, 458 (1842). Whether *quasi* judicial officers have jurisdiction to make a decision in any case is always open to inquiry, and their decision in any case can be attacked collaterally for want of jurisdiction. *Cagwin v. Town of Hancock*, 84 N. Y. 532 (1881). In laying out highways superintendents act under a special and statutory authority; and it must appear, upon the face of their proceedings or by proof *aliunde*, that they acquired jurisdiction. *Miller v. Brown*, 56 N. Y. 383 (1874); *People ex rel. Bodine v. Goodwin*, 5 N. Y. 568 (1851). In opening new roads, and altering and shutting up old one, the superintendent acts judicially; but in describing and recording a road which has become public by twenty years' use he performs little more than a ministerial duty. *People ex rel. Commissioners of Highways of Cortlandville v. Judges of Cortland County*, 24 Wend. 491 (1840); *Woolsey v. Tompkins*, 23 Wend. 324 (1840).

The proceeding by mandamus, to compel a town superintendent of highways to open a road, should not be resorted to where its necessary effect would be to subject the superintendent to an action for trespass. If the facts show a want of jurisdiction, so as to make the proceedings entirely void, this is a sufficient ground for not awarding a peremptory mandamus. Town superintendents are not estopped, by the fact that they have assumed an unlawful authority and acted under it, from asserting their want of jurisdiction and refusing to proceed further, whenever they discover their error. *People ex rel. Ottman v. Commissioners of Highways of Seward*, 27 Barb. 94 (1858); *Ex parte Clapper*, 3 Hill, 458 (1842).

A new road may be laid out partly over a highway already existing; what is a suitable distance for occupation of the old road will depend upon the facts in each case by itself. *People ex rel. Thomas v. Commissioners of Miltford*, 37 N. Y. 360 (1867). The widening of a highway is the "alteration" not the "laying out." *People ex rel. Lasher v. McNeil*, 2 T. & C. 140 (1873.)

The power to alter and the power to record are not only given by distinct clauses of the statute, but they are conferred for different purposes; the former is given for the purpose of making the road better by changing its site, the latter for preserving a written memorial of the road as it already exists. "Laying out" is used in reference to establishing a road where none existed before and cannot apply to an old road. *People ex rel. Commissioners of Highways of Cortlandville v. Judges of Cortland County*, 24 Wend. 491 (1840).

The following forms will be found of use in carrying out the provisions of this section:

#### FORM No. 46.

##### Dedication of Land For Highway.

Know all men by these presents, that I, R. S., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, N. Y., for value received, hereby dedicate to the town of \_\_\_\_\_, aforesaid, a strip of land across my premises in said town, for the purpose of a highway, described as follows: [Here de-

scribe premises dedicated.] And I also hereby release said town from all damages by reason of the laying out and opening of said highway.

In witness whereof, I have hereunto set my hand and seal, this

[SEAL] day of \_\_\_\_\_, 19 \_\_\_\_ .

R. S.

STATE OF NEW YORK, }  
 COUNTY OF \_\_\_\_\_ } ss.:

On this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, before me, the subscriber, personally came R. S. to me known to be the person described in, and who executed the foregoing instrument.

A. B.

*Justice of the Peace [or Notary Public.]*

**FORM No. 47.**

**Order Laying Out Highway on Dedication.**

R. S. of the town of \_\_\_\_\_, county of \_\_\_\_\_, having dedicated to the town of \_\_\_\_\_, aforesaid, a strip of land across his premises described as follows: [Describe premises dedicated], for the purposes of a highway, by a written instrument duly executed by him, and which is annexed hereto, and having by said instrument released said town from all damages by reason of the laying and opening of such highway, it is hereby

Ordered that a highway shall be and the same is hereby laid out in said town over the premises so dedicated as follows: Beginning [here insert survey].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ .

[Signature of town superintendent.]

**Consent of Town Board.**

The undersigned, members of the town board of the town of \_\_\_\_\_, hereby consent that the town superintendent of highways of such town make an order laying out a highway over the lands dedicated to such town as described in the said order, pursuant to section 191 of the Highway Law.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ .

[Signatures of members of town board.]

**FORM No. 48.**

**Application to Lay Out or Alter Highway on Release of Damages.**

To \_\_\_\_\_, town superintendent of highways, town of \_\_\_\_\_, county of \_\_\_\_\_:

The undersigned, a resident of \_\_\_\_\_, and assessable for highway taxes in the town of \_\_\_\_\_, hereby applies to you for an order laying out [or altering] a highway located in such town, commencing at [describe highway to be laid out, or manner of altering highway,] which highway as so laid out [or altered] will pass through the lands of \_\_\_\_\_, all of whom consent to the laying out [or altering] of such highway, and will execute releases from all damages occasioned thereby.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ .

[Signature of Applicant.]

## FORM No. 49.

## Application to Discontinue a Highway on Release of Damages.

To \_\_\_\_\_ town superintendent of highways, town of \_\_\_\_\_ ,  
county of \_\_\_\_\_ :

The undersigned, a resident of \_\_\_\_\_ , and assessable for highway taxes in the town of \_\_\_\_\_ , hereby applies to you for an order discontinuing a highway located in such town, commencing at [describe highway to be discontinued], on the ground that such highway has become useless since it was laid out; such highway passes through or affects the lands of \_\_\_\_\_ , all of whom consent to the discontinuance of such highway and will execute releases from all damages occasioned thereby.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ .

[Signature of Applicant.]

## FORM No. 50.

## Release of Damages on Laying Out, Etc., Highway.

Know all men by these presents, that I. R. S., of the town of \_\_\_\_\_ county of \_\_\_\_\_ , N. Y., for and in consideration of the sum of [not exceeding \$100], hereby consent that a highway be laid out and opened [or altered] across my premises in the town of \_\_\_\_\_ , county of \_\_\_\_\_ , N. Y., pursuant to the application of \_\_\_\_\_ , dated the \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ , and hereby release said town from all damages by reason of laying out and opening [or altering] such highway through my premises.

In witness whereof, I have set my hand and seal hereunto, on this \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ .

R. S.

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } ss.:

On this \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ , before me, the subscriber, personally came R. S. to me known to be the person described in and who executed the foregoing release, and acknowledged that he executed the same.

L. F.

Justice of the Peace [or Notary Public.]

## FORM No. 51.

## Consent of Town Board.

The undersigned, the town board of the town of \_\_\_\_\_ , in the county of \_\_\_\_\_ , hereby consent that the town superintendent of highways of said town make an order laying out [or altering or discontinuing] the proposed highway described in the application of \_\_\_\_\_ , pursuant to section 191 of the Highway Law.

In witness whereof, we have hereunto set our hands on \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ .

[Signature of each member of town board.]

## FORM No. 52.

## Order Laying Out or Altering Highway Upon Application.

Written application having been made to \_\_\_\_\_, town superintendent of highways of the town of \_\_\_\_\_, by a resident of such town and a person [or corporation] assessable for highway taxes therein, and the written consent of the town board of said town having been given as prescribed by law, and releases from damages having been executed by the owners of the land through which the proposed highway is to be opened, copies of which are hereto annexed, the consideration paid to any one claimant for such damages, not exceeding \$100, and of all the claimants not exceeding \$500;

*It is hereby ordered* that a highway shall be, and the same is hereby laid out [or altered] in said town as follows: [Here insert survey bill.] And the line of survey shall be the center of the highway, which shall be \_\_\_\_\_ rods in width.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

[Signature of town superintendent.]

§ 192. **Application.**— Any person or corporation assessable for highway taxes may make written application to the town superintendent of the town in which he or it shall reside, or is assessable, to alter or discontinue a highway, or to lay out a new highway.

**Derivation.** This section is derived from former Highway Law, section 82.

**Who may make application.** The former law provided that any person or corporation assessable for highway labor might make the application. The present law provides that any person or corporation assessable for highway tax may make such application. This is to be construed as permitting any person or corporation assessable for highway tax in the town to institute proceedings for laying out, altering or discontinuing a highway. It may include taxpayers residing in a village constituting a separate road district because such taxpayers although exempt from tax for ordinary repairs and improvements of highways are nevertheless subject to the payment of taxes for other highway purposes and are therefor assessable for highway taxes within the meaning of this section. There may be some doubt as to this question. The only reason for making the change was because the labor system of taxation was abolished and a money tax substituted therefor. The Legislature may not therefor have intended by the change to have extended the right of making application to taxpayers in a village who were formerly exempted from highway labor. It was held under the former law that a taxpayer of a village not assessable for highway labor was not competent to make the application. Commissioners of Highways of Town of Bushwick v. Meserole, 10 Wend. 123 (1833).

**A non-resident,** owning real estate in the town, may make application; and he is not restricted to roads running through his own lands. People *ex rel.* Wait v. Eggleston, 13 How. Pr. 123 (1856). A person liable to be assessed in one town may institute proceedings to lay out a highway partly in his own town and partly in another. People *ex rel.* Knapp v. Keck, 90 Hun, 499 36 N. Y. Supp. 51 (1895).

It is not necessary that the person who makes the application should be a resident of the town, but merely that the person or corporation shall be assessable in the town. *N. Y., N. H. & H. R. R. Co. v. New Rochelle*, 29 Misc. 195, 60 N. Y. Supp. 904 (1899); *Harrington v. People*, 6 Barb. 607 (1849).

A municipal corporation assessable for highway taxes in a town may make application. *N. Y., N. H. & H. R. R. Co. v. Village of New Rochelle*, 29 Misc. 195, 60 N. Y. Supp. 904 (1899).

Town superintendents of highways, as such, may not make application to lay out a highway. *People ex rel. Bevins v. Supervisors*, 82 Hun, 298, 31 N. Y. Supp. 248 (1894). But they may lay out a road of their own motion without any application therefor. *Marble v. Whitney*, 28 N. Y. 297 (1863).

Application by a person liable to assessment is not necessary to confer jurisdiction upon the town superintendent of highways to discontinue a road; they have power to discontinue on their own motion, and therefore a defective application does not invalidate such proceedings. *People ex rel. Bristol v. Nichols*, 51 N. Y. 470 (1873).

§ 193. Application for condemnation commissioners.—Whenever the land is not dedicated to the town for highway purposes, and not released as herein provided, the applicant shall, within thirty days after presenting the application to the town superintendent, and after at least five days' notice to said town superintendent of the time and place of the application to the county court, in this section provided for, by verified petition showing the applicant's right to so present the same, and that such application has been in good faith presented, and if the county judge require on such notice to such parties interested as he shall direct, apply to the county court of the county where such highway shall be, for the appointment of three commissioners to determine upon the necessity of such highway proposed to be laid out or altered, or to the uselessness of the highway proposed to be discontinued and to assess the damages by reason of laying out, opening, altering or discontinuing such highway. Such application shall be accompanied by the written undertaking of the applicant executed by one or more sureties, approved by the county judge, to the effect that if the commissioners appointed determine that the proposed highway or alteration is not necessary or that the highway proposed to be discontinued is not useless, the sureties will pay to the commissioners their compensation at the rate of four dollars for each day necessarily spent and all costs and expenses necessarily incurred in the performance of their duties, which amount shall not exceed the sum of one hundred dollars.

**Derivation.** This section is derived from former Highway Law, section 83 as amended by L. 1907, chap. 50 without change.



**Instituting proceedings.** Written application for laying out, altering or discontinuing a highway must first be presented to the town superintendent. This is essential for he may, under section 191, make an order for such purpose upon securing a release from all damages from the owners of lands to be taken or affected thereby, thus rendering it unnecessary to take subsequent proceedings before commissioners appointed as provided in this article. It was held under the former law, and the rule is as applicable now, that the statute contemplates that an application shall first be made to the highway commissioner and that within thirty days thereafter application shall be made to the court for the appointment of commissioners. *People ex rel. Smith v. Allen*, 37 App. Div. 248, 55 N. Y. Supp. 1057 (1899); *People ex rel. Knapp v. Keck*, 90 Hun, 497, 36 N. Y. Supp. 51 (1895).

The application must be made to the county court and not to the county judge. The county court is always open for the transaction of any business, for which notice is not required to be given to an adverse party, except where it is specially prescribed by law, that the business must be done at a stated term. Code of Civil Procedure, section 355.

This and the following section of the law are designed to point out the initiatory steps in all proceedings to lay out, alter or discontinue a highway. *Matter of Taylor & Allen*, 8 App. Div. 395, 40 N. Y. Supp. 839 (1896). The statute must be strictly complied with. *People ex rel. Scrafford v. Stedman*, 57 Hun, 280, 10 N. Y. Supp. 787 (1890). The statute does not impose upon the town any liability for damages sustained by an abutting owner by reason of a change of grade of a highway. *Smith v. Boston & Albany R. R. Co.*, 99 App. Div. 94, 91 N. Y. Supp. 412 (1904).

A land owner from whose town a private road leads into another town and there ends in a *cul de sac*, may properly apply to have this road which has been used for more than twenty years laid out as a public road to the boundary line between the towns. *Matter of Burdick*, 27 Misc. 298, 58 N. Y. Supp. 759 (1899).

**Sufficiency of application.** The above section does not require that an application to the county court, for the appointment of commissioners in a proceeding to lay out a highway, shall contain affirmative allegations that the land proposed to be taken has not been dedicated to the town for highway purposes, or has not been released by the owner for that purpose, or that it has been made within thirty days after its presentation to the town superintendent, and the failure of the applicant to allege such facts does not deprive the court of jurisdiction to entertain the proceeding. *Matter of Buel*, 168 N. Y. 423 (1901).

The commissioners appointed by the county court do not have jurisdiction of the subject matter if the petitioner fail to allege or state facts in his application to the town superintendent showing that he was assessable in the town. The petition to the county court must also show that the petitioner was assessable in such town and that the land to be taken for the new highway was not dedicated to the town for highway purposes or released by the owners. *Matter of Pugh*, 46 App. Div. 634, 61 N. Y. Supp. 1145 (1899), reversing 22 Misc. 43, 49 N. Y. Supp. 398.

**Discontinuing highway.** A proceeding under this section for the appointment of commissioners to determine whether a highway has become useless and should be abandoned, may be maintained although the highway in

question has not yet been opened nor the damages been paid for the same. Matter of McFadden, 96 App. Div. 58, 89 N. Y. Supp. 104 (1904).

The term "useless," as used in this section, means "practically useless," and not "absolutely useless." The test is not whether any use is in fact made of the part of the highway sought to be discontinued, but whether the part remaining after the discontinuance will or will not subserve every practical purpose that is now subserved by both parts. Matter of Trask, 45 Misc. 244, 92 N. Y. Supp. 156 (1904). The uselessness of a highway proposed to be discontinued, refers to that of a road for a time opened, but by change of circumstances losing its usefulness; not to a uselessness existing at the time it was laid out. People *ex rel.* Miller v. Griswold, 67 N. Y. 59 (1876). Any change of conditions rendering a highway useless is as effective as if its uselessness had arisen from age and use. Matter of McFadden, 96 App. Div. 58, 89 N. Y. Supp. 104 (1904).

To authorize the discontinuance of a highway, the weight of evidence must show and the commissioners must find that it is useless; a finding that it is not necessary, or that a proposed new road would be better, is insufficient. Matter of Coe, 19 Misc. 549, 44 N. Y. Supp. 910 (1897).

**Notice.** Omission to give the required notice to persons entitled thereto is fatal. People *ex rel.* Willis v. Smith, 7 Hun, 17 (1876).

**Waiver of notice.** Although town superintendents are entitled by this section to five days' notice of the application to lay out a new highway, they waive such notice by appearing before the county court without objection. Matter of Wood, 111 App. Div. 781, 97 N. Y. Supp. 871 (1906). The town superintendent, who is the only person entitled as a matter of right to notice of the application, has the power to waive such notice and appear without notice. Matter of Wood, 107 App. Div. 514, 95 N. Y. Supp. 260 (1905).

**Employment of attorneys.** Town superintendents upon receiving notice of an application for the appointment of commissioners to lay out a highway may employ attorneys to oppose such application, and the expense thereof may be paid by them and be thereafter audited by the general board. McCoy v. McClarty, 53 Misc. 69, 104 N. Y. Supp. 80 (1907). This article does not authorize an application to lay out a highway to be made by a town superintendent as such. He may appear after the appointment of commissioners, and doubtless he can at that time oppose or aid in the laying out of the road, in the same way as may the applicant and others interested. At that time he could, if proper and necessary, employ counsel to aid him in the matter of laying out the road and assessing damages; but such counsel would be employed by him, not by the town. People *ex rel.* Bevins v. Supervisors, 82 Hun, 298, 31 N. Y. Supp. 248 (1894).

**Form of application.** The application must be presented by the person or persons making the original application to the town superintendent, and within thirty days after such original application was so presented. The application should be in the form of a petition verified by the applicant and should show:

1. That the applicant made a written application to the town superintendent for an order laying out, altering or discontinuing a highway.

2. That the applicant is a person or corporation assessable for highway taxes within the town.

3. That the application has been presented in good faith.

4. That the town superintendent has not laid out, altered or discontinued such highway, and that a release from all damages has not been obtained from the owners of the lands to be taken or affected thereby. Such application may be in the following form:

**FORM No. 53.**

**Application For Appointment of the Commissioners.**

County court, county of .

<p>In the Matter of the Application of John Dorn to lay out (alter or discontinue) a highway in the town of , and the assessment of damages therefor.</p>
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The petition of John Dorn, of the town of , in said county, respectfully shows that your petitioner is a person [or corporation] assessable for highway taxes in the town of , said county; that on the day of , 19 , he presented an application in writing to the town superintendent of highways of said town as follows: [Insert copy of application to the commissioners.] That said application was in good faith made; that the said town superintendent of highways has not laid out [altered or discontinued] said highway pursuant to section 191 of the Highway Law; that the lands have not been dedicated for the purpose of such highway by the owners thereof, nor have such lands been released by such owners for such purpose.

Wherefore, your petitioner prays that three commissioners be appointed pursuant to section 194 of the Highway Law, to determine upon the necessity of the proposed highway [or altering or discontinuing the said highway], and to assess the damages by reason of laying out and opening [or altering or discontinuing] such highway.

Dated this day of , 19 .

John Dorn.

STATE OF NEW YORK, }  
COUNTY OF . } ss.:

John Dorn, being duly sworn, says he has read the foregoing petition by him subscribed, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

John Dorn.

Subscribed and sworn to before me,  
this day of , 19 .

G. H.,  
Justice of the Peace.

## FORM No. 54.

## Notice to Town Superintendent of Application.

[Title as in preceding form.]

To \_\_\_\_\_, town superintendent of highways, town of \_\_\_\_\_,  
county of \_\_\_\_\_ :

*Take notice* that upon the petition herein, a copy of which is hereto annexed and served upon you, an application will be made to the county court of the county of \_\_\_\_\_, at \_\_\_\_\_, in the village [or city] of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, or as soon thereafter as counsel may be heard, for the appointment of three commissioners to determine upon the necessity of laying out [or altering] the proposed highway described in such petition [or, the uselessness of the highway proposed to be discontinued, described in such petition], and to assess the damages by reason of the laying out, [altering or discontinuing] such highway.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

[Signature of party or attorney.]

**Undertaking; liability of applicant for costs.** The applicant is required by this section to give an undertaking for the payment of the compensation of the commissioners and the costs and expenses necessarily incurred in the proceedings. This is for the purpose of protecting the town in case the commissioners decide that the application should not be granted. If the application is granted the compensation of the commissioners and the costs of the proceedings are chargeable against the town. See sections 202 and 203, *post*. The undertaking is insufficient unless approved by the county judge before whom the proceeding is instituted. *Matter of Fanning*, 26 App. Div. 627 50 N. Y. Supp. 1126 (1898). The intent of the section is, if the proposed improvement should be carried out, the town shall pay the costs and expenses, and if the determination is adverse, the expenses shall be borne by the applicant.

Where the applicant has already paid costs of parties opposing the application, as fixed by the order of the County Court, amounting to the sum herein prescribed as the limit of liability, the commissioners appointed to determine upon the necessity of the highway are not entitled to recovery of their fees from him; the commissioners must be deemed to accept their appointments with knowledge of this fact. The provision is of doubtful wisdom, as it would seem to offer an inducement to decide in favor of the opening of a highway for personal reasons; that is, to obtain payment of their fees. *Patton v. Miller*, 28 App. Div. 517, 51 N. Y. Supp. 202 (1898).

It is improper to assess the fees of the commissioners upon the town where the proceeding has failed, even though such failure is due not to an adverse report by the commissioners, but because a private individual withholds his consent to have the highway pass through his yard, and the town superintendent does not certify that the public interests would be promoted by the opening of the highway. This is just, as the proceeding was instituted not by the town, but by the applicant at his own election. The fees of the commissioners and the costs of the proceedings stand on the same footing, and if the applicant be liable for the latter he may also be liable for the former. *Matter of Miller*, 9 App. Div. 260, 41 N. Y. Supp. 581 (1896).

The undertaking required of the applicant may be in the following form:

FORM No. 55.

Undertaking of Applicant.

Whereas, John Dorn, of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, has on this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, made application to the County Court of the county of \_\_\_\_\_, as provided in section 193 of the Highway Law, for the appointment of three commissioners to determine upon the necessity of laying out, a proposed highway [or, altering a highway; or, to determine the uselessness of a highway proposed to be discontinued], and to assess the damages by reason thereof;

Now, therefore, we, the said John Dorn, as principal, and Isaac Hull and John Smith, of the town of \_\_\_\_\_, as sureties, do hereby jointly and severally undertake, as provided in section 193 of the Highway Law, that if the commissioners appointed determine that proposed highway [or alteration] is unnecessary [or that the highway proposed to be discontinued is not useless] we will pay to the said commissioners their compensation at the rate of four dollars for each day necessarily spent, and all costs and expenses necessarily incurred, in the performance of their duties, which amount shall not exceed one hundred dollars.

In witness whereof, we have this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, set our hands and seals.

[Signatures of principal and sureties.]

Acknowledgment.

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } ss.:

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before me, the subscriber, personally appeared John Dorn, Isaac Hull and John Smith, to me personally known to be the same persons mentioned in, and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

[Signature of officer taking acknowledgment.]

Justification of sureties.

STATE OF NEW YORK, }  
COUNTY OF \_\_\_\_\_ } ss.:

Isaac Hull and John Smith, the sureties mentioned in the foregoing undertaking, being severally duly sworn, each for himself deposes and says that he is a resident and freeholder within the town of \_\_\_\_\_, county of \_\_\_\_\_, and is worth \_\_\_\_\_ dollars over and above all debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale on execution.

[Signature of sureties.]

Subscribed and sworn to before me,  
this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of officer.]

Approval of County Judge.

I hereby approve of the foregoing undertaking, and of the sufficiency of the sureties named therein.

E. F.,  
County Judge..

§ 194. **Appointment of condemnation commissioners, and their duties.**— Upon the presentation of such petition, the county court must appoint three disinterested freeholders, who shall not be named by any person interested in the proceedings, who shall be residents of the county, but not of the town wherein the highway is located, and who shall not be related by consanguinity or affinity within the sixth degree to the applicant or to any person interested in the proceeding or to the owner of any lands to be taken or affected by the laying out, alteration or discontinuance of a highway, as commissioners to determine the questions mentioned in the last section. They shall take the constitutional oath of office, and appoint a time and place at which they shall all meet to hear the town superintendent and supervisor of the town where such highway is situated, and others interested therein. They shall personally examine the highway described in the application, hear any reasons that may be offered for or against the laying out, altering or discontinuing of the highway, and assess all damages by reason thereof. They may adjourn the proceedings before them from time to time, issue subpoenas and administer oaths in such proceedings, and they shall keep minutes of their proceedings, and shall reduce to writing all oral evidence given before them upon the subject of the assessment of damages. They shall make duplicate certificates of their decision, and shall file one in the town clerk's office of the town, and the other, with such minutes and evidence, in the county clerk's office of the county in which the highway or proposed highway is located.

**Derivation.** This section is taken from former Highway Law, section 84, as amended by L. 1907, chap. 50.

**Order appointing commissioners.** If the petition has been presented in good faith, it would seem that it is the plain duty of the County Court to appoint the commissioners asked for; the provisions of this section are explicit in this respect. *Matter of McFadden*, 96 App. Div. 58, 89 N. Y. Supp. 104 (1904).

The order appointing the commissioners may be in the following form:

**FORM No. 56.**

**Order Appointing Commissioners.**

At a \_\_\_\_\_ term of the County Court of the county of \_\_\_\_\_,  
held at \_\_\_\_\_, in the \_\_\_\_\_, in and for said county.  
Present — Hon. E. E., County Judge.  
(Title as in Form. No. 53.)

On reading and filing the petition of John Dorn, of the town of \_\_\_\_\_,  
in said county, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, praying for

three commissioners to be appointed, pursuant to section 194 of the Highway Law, to certify as to the necessity of laying out and opening [altering or discontinuing] a highway beginning [insert the description] and to assess the damages by reason of laying out [altering or discontinuing] such highway, and on motion of John Doe, attorney for the above-named applicant,

*It is hereby ordered* that S. S., G. G. and J. J., of the town of \_\_\_\_\_, said county, be, and they are hereby appointed as such commissioners.  
[Signature of County Judge.]

**Notice to commissioners.** The commissioners so appointed should be notified of their appointment by the service upon them of the order of appointment and a notice annexed thereto in the following form:

#### FORM No. 57.

##### Notice of Appointment.

*To S. S., G. G. and J. J.:*

Take notice, that you and each of you have been duly appointed commissioners, by an order of the County Court, a copy of which is hereto annexed, and you are hereby requested to fix a time and place at which you will all meet to hear the town superintendent of highways of the town of \_\_\_\_\_, and all other persons interested in the highway mentioned in the said order.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

JOHN DORN [or signature of attorney.]

**Qualification of commissioners.** The commissioners must be resident freeholders of the county but not of the town wherein the highway to be laid out, altered or discontinued is located. A relative of the applicant or the owner of any of the lands to be taken or affected by the highway, either by blood or marriage, within the degree prescribed, may not be appointed.

Commissioners appointed to determine as to the uselessness of a highway must be freeholders at the time of their appointment. The appointment of a commissioner who was not a freeholder at such time is not validated by his becoming a freeholder prior to the hearing, and the appointment will be vacated on motion. *Matter of Trask*, 81 App. Div. 318, 81 N. Y. Supp. 53 (1903).

Where a notice and petition in proceedings instituted to lay out a highway state all of the facts required by the statute the County Court may make an order appointing commissioners, the effect of which is an adjudication that the persons appointed are eligible. The fact that it does not appear in the order that such commissioners were "disinterested freeholders" residing in the county is not a defect affecting the court's jurisdiction. *Matter of Baker*, 173 N. Y. 249 (1903). Statement that commissioners were freeholders allowed to stand in return to certiorari although not appearing in the record. *People ex rel. Lovell v. Melville*, 7 Misc. 214, 27 N. Y. Supp. 1101 (1894).

**The constitutional oath of office** is prescribed by section 1 of Article 13 of the Constitution. Such oath must be in the following form:

#### FORM No. 58.

##### Oath of the Commissioners.

"I do solemnly swear [or affirm] that I will support the Constitution of the United States, and the Constitution of the State of New York, and that

I will faithfully discharge the duties of the office of commissioner to lay out [alter or discontinue] a highway situated in the town of \_\_\_\_\_ according to the best of my ability."

The constitutional oath of office required of commissioners appointed under this section means the oath prescribed in article 13, section 1, of the Constitution, requiring, among other things, an oath to support the Federal and State Constitutions; this requirement is mandatory, and where it is not embodied in the oath taken the proceeding is void and objections may be taken on the motion to confirm their decision. *Matter of David*, 44 Misc. 192, 89 N. Y. Supp. 812 (1904). The taking of such oath is necessary to give the commissioners jurisdiction, and the parties to the proceedings have no right to waive an omission. *People v. Connor*, 46 Barb. 333 (1866).

**Subpoena of witnesses and administering oaths.** The commissioners appointed, as provided herein, being authorized to issue subpoenas and administer oaths, are authorized to compel the attendance of witnesses and the giving of testimony by them. See *Code Civ. Proc.*, §§ 854-862. Under these sections they are authorized to provide summarily for the appearance of witnesses before them. In case of a failure to obey a subpoena the person may be proceeded against as provided in such sections of the Code.

The subpoena may be in the following form:

.. **FORM No. 59.**

**Subpoena of Witnesses Before the Commissioners.**

The People of the State of New York

to \_\_\_\_\_ :

You and each of you are hereby commanded to be and appear before us, commissioners appointed pursuant to section 194 of the Highway Law, by the County Court of \_\_\_\_\_ county, at the \_\_\_\_\_, in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in \_\_\_\_\_ noon, to testify and give evidence in the matter of the laying out, [altering or discontinuing] a highway located in the town of \_\_\_\_\_, and assessing the damages therefor, then and there to be heard and determined.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of the commissioners.]

The oath to be administered to witnesses may be in the following form:

**FORM No. 60.**

**Oath of Witnesses.**

You do solemnly swear that the evidence that you shall give in respect to the necessity of laying out [altering or discontinuing] the highway located in the town of \_\_\_\_\_, and described as follows; [describe generally the highway affected], and assessing the damages therefor, shall be the truth, the whole truth and nothing but the truth so help me God.

**Taking evidence.** The oral evidence given before the commissioners upon the subject of the assessment of damages must be reduced to writing. The section does not seem to require the evidence pertaining to the necessity of the laying out, altering or discontinuing of the highway to be taken down as



given by the witnesses. It would be better practice, however, for the commissioners to include all the evidence given before them in the minutes of their proceedings. Such evidence should be presented to the court upon the motion to confirm, vacate or modify the decisions of the commissioners, as provided in section 199.

Error in the admission and exclusion of evidence relating to damages which would be sustained by reason of the construction of the proposed road, will authorize the reversal of order based upon the decision of the commissioners. *Matter of Pugh*, 46 App. Div. 634, 61 N. Y. Supp. 1145 (1899), reversing 22 Misc. 43, 49 N. Y. Supp. 398.

**Conduct of hearing.** Owners of lands which will be affected by the discontinuance of the highway, although not abutting thereon, are entitled to be heard in opposition to the proceedings to discontinue; such landowners cannot be made by the commissioners to pay a sum of money as a condition of being heard. *Matter of Coe*, 19 Misc. 549, 44 N. Y. Supp. 910 (1897).

The commissioners appointed by the County Court are not bound to follow the route of the petition for the road with precision, and an extension of one of the corners further than described in the petition is not erroneous if thereby a better road is obtained. *People ex rel. Cecil v. Carman*, 69 Hun, 118, 23 N. Y. Supp. 386 (1893).

The commissioners cannot be compelled to have the hearings at any particular place in the town where the highways are located. *Matter of Coe*, 19 Misc. 549, 44 N. Y. Supp. 910 (1897).

**An adjournment** by two of the commissioners in the absence of the third, who had been duly notified of the first meeting is valid, the power of adjournment being in the majority. *In re Newland Ave.*, 15 N. Y. Supp. 63, 38 N. Y. St. Rep. 796 (1891).

§ 195. **Notice of meeting.**—The applicant shall cause, at least eight days previous, written or printed notice to be posted up in not less than three public places in the town specifying, as near as may be, the highway proposed to be laid out, altered or discontinued, the tracts or parcels of land through which it runs, and the time and place of the meeting of the commissioners appointed by the county court to examine the highway as mentioned in the last section. Such notice shall also, in like time, be personally served on the owner and occupant of the land, if they reside in the town, or by leaving the same at their residence with a person of mature age; if they do not reside in the same town, or service cannot be made, a copy of such notice shall be mailed to such owner and occupant, if their post-office address is known to the applicant or ascertainable by him upon reasonable inquiry.

**Derivation.** This section is taken from former Highway Law, section 85 without change.

**Necessity of notice.** A statute authorizing proceedings for the acquisition of land for a public purpose which makes no provision for notice to the owner

thereof, either of the taking of the land or of the ascertaining of the damages occasioned thereby would be unconstitutional. "Due process of law" includes notice to the person whose property is to be taken. *People ex rel. Dexter v. Mosier*, 56 Hun, 64, 8 N. Y. Supp. 621 (1890). In any proceeding to condemn the private property of a citizen, all notices and hearings may tend to give the party to be affected any semblance of benefit, must be carefully observed. *People ex rel. Odle v. Kniskern*, 54 N. Y. 52 (1873).

It follows, therefore, that the statutory requirement as to notice must be strictly followed. Without such requirement in the statute, it would be void; and the want of a notice will invalidate all subsequent proceedings, for without it the commissioners have no jurisdiction to act. It has been held that a failure to serve notice upon an owner or occupant of land through which the proposed highway is to be laid out is fatal to the proceedings so far as the property of such owner or occupant is concerned; objection on this score may be interposed by the town superintendent on hearing of an application for mandamus to compel him to lay out the highway. *People ex rel. Smith v. Allen*, 37 App. Div. 248, 55 N. Y. Supp. 1057 (1899); *People ex rel. Edick v. Osborn*, 20 Wend. 186 (1838).

Required notice to party interested cannot be dispensed with. *Terpening v. Smith*, 46 Barb. 208 (1863); *People ex rel. Dana v. Robertson*, 17 How. Pr. 74 (1858). No jurisdiction of the owner or occupant is acquired until proper notice has been given. *People ex rel. Willis v. Smith*, 7 Hun, 17 (1876); *People ex rel. Wells v. Brown*, 47 Hun, 459 (1888). Want or defect of notice is an irregularity which may be made the ground of a motion to vacate; the proceedings and determination of the commissioners cannot otherwise be adequately reviewed by an appeal to a court. *People ex rel. Scrafford v. Stedman*, 57 Hun, 280, 10 N. Y. Supp. 787 (1890).

**Sufficiency of notice.** Such notice must specify, as near as possible, the highway proposed to be laid out, altered or discontinued, and the tracts or parcels through which it runs, and the time and place of the meeting of the commissioners. It need not specify courses and distances. It should give the termini and general route of the proposed highway. The notice is not vitiated because erroneously stating that some of the lands were unimproved. *Snyder v. Trumbour*, 38 N. Y. 355 (1868).

Where the notice to the landowner states the frontage of his land at less than it actually is, the validity of the proceeding is not affected, but no more land is acquired for the purposes of the street than is described in the notice as "proposed to be taken." *In re Newland Ave.*, 15 N. Y. Supp. 63, 38 N. Y. St. Rep. 796 (1891). Order of commissioners reversed because notice served failed to properly describe proposed new road. *Matter of Pugh*, 46 App. Div. 634, 61 N. Y. Supp. 1145 (1899), reversing 22 Misc. 43, 49 N. Y. Supp. 398.

**Service of notice.** It is not requisite that the town superintendent be personally served with the notice; the posted notices are sufficient notice to him. *Matter of David*, 44 Misc. 192, 89 N. Y. Supp. 812 (1904). Personal service is required to be made upon the owner and occupant of the land, if they reside in the town. Where prior order is reversed new notices must be served for subsequent proceedings. *People ex rel. Odle v. Kniskern*, 54 N. Y. 52 (1873).

**Waiver of notice.** The attendance of the occupant of the land as a witness will not be deemed a waiver of notice. *People ex rel. Edick v. Osborn*, 20

Wend. 186 (1838). An owner who appears and is heard, without objecting to the jurisdiction because of failure to serve upon him, cannot raise the objection on appeal. People *ex rel.* Becker v. Burton, 65 N. Y. 452 (1875); Cooper v. Bean, 5 Lans. 318 (1871). As to waiver of notice see People *ex rel.* Scraf-ford v. Stedman, 57 Hun, 280, 10 N. Y. Supp. 787 (1890).

**Form of notice.** The notice required by this section may be in the following form:

**FORM No. 61.**

**Notice of Meeting of Commissioners.**

Notice is hereby given that the undersigned has made application to the town superintendent of highways of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, for the laying out [altering or discontinuing] of a highway in said town commencing [here insert description as in application], which proposed [or altered] highway will pass through the lands of [describe who], and by an order of the County Court dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, S. S., G. G. and J. J. were appointed commissioners to examine as to the necessity of said proposed highway [alteration or discontinuance], and to assess the damages by reason of the laying out and opening [alteration or discontinuance] of such highway; and that said commissioners will all meet at \_\_\_\_\_, in said town, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to examine the proposed highway [or the highway] and hear the commissioners of highways and all others interested therein, and to assess the damages if such highway be determined to be necessary [or is altered or discontinued].

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

JOHN DORN.

The applicant should make an affidavit of the due service of the notice, which may be in the following form:

**FORM No. 62.**

**Affidavit of Service.**

STATE OF NEW YORK, }  
 COUNTY OF \_\_\_\_\_ } ss.:

John Dorn, being duly sworn, says that he caused notices in writing, of which the within is a copy, to be posted up at \_\_\_\_\_, at \_\_\_\_\_ and \_\_\_\_\_, three public places in the town of \_\_\_\_\_, said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and that he served a like notice on [name all the owners and occupants of the lands through which the highway is proposed to be laid out, altered or discontinued] on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by [state how served], and that said notices were posted at the respective places, and served on the respective persons herein named, at least eight days before the time specified therein for the meeting of said commissioners.

JOHN DORN.

Subscribed and sworn to before me,  
 this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

G. H.,  
*Justice of the Peace.*

§ 196. **Decision of condemnation commissioners in favor of application.**—If a majority of the commissioners appointed by the county court shall determine that the highway or alteration applied for is necessary, or that the highway proposed to be discontinued is useless, they shall assess all damages which may be required to be assessed by reason thereof and make duplicate certificates to that effect. If the petition is for the laying out of a highway, the commissioners shall also include in their certificates what the probable cost would be of laying out and completing the proposed highway, in their opinion, based upon the evidence given before them on the hearings.

**Derivation.** This section is taken from former Highway Law, section 86, as amended by L. 1901, chap. 441, without change.

**Determination as to necessity or uselessness.** Upon the facts presented before them and an examination of the highway the commissioners must determine as to the necessity of the proposed laying out, alteration or discontinuance. If they decide in favor thereof they are then required to assess the damages to be awarded to the proper parties. To constitute a public necessity, it is not required that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the property taken. *Matter of Town of Whitestown*, 24 Misc. 150, 53 N. Y. Supp. 397 (1898). The statute contemplates that the question of necessity shall be decided by the commissioners, not by the court. *Kelsey v. King*, 32 Barb. 410 (1860).

Where the main object of a proceeding, taken ostensibly to lay out a public highway, is to furnish access to the lot of an individual, there is no public necessity. In such a case the decision of the commissioners in favor of laying out the highway should be set aside, and the individual remitted to her right to apply for a private road. *Matter of Lawton*, 22 Misc. 426, 50 N. Y. Supp. 408 (1898).

To authorize the discontinuance of a highway, the weight of evidence must show and the commissioners must find that it is useless: a finding that it is not necessary, or that a proposed new road would be better, is insufficient. *Matter of Coe*, 19 Misc. 549, 44 N. Y. Supp. 910 (1897). Part of a highway may be discontinued as useless, and may be left ending at private property. *People ex rel. Bristol v. Nichols*, 51 N. Y. 470 (1873).

It is a question of fact for the commissioners as to whether the proposed highway is a public necessity, and the statute contemplates that the question of fact shall be decided by the commissioners and not by the court. The findings of such a tribunal should no more be set aside by the court than should those of a jury. *Matter of Town of Whitestown*, 24 Misc. 150, 53 N. Y. Supp. 397 (1898); *Matter of Opening Eleventh Ave.*, 49 How. Pr. 208 (1875).

**Assessment of damages in general.** The commissioners are to assess all damages occasioned by the laying out, altering or discontinuing of the highway. In determining such damages they are to consider the effect of the proposed change upon the property, and if land is taken for the highway, the value thereof is also to be considered.

The determination of the commissioners must be confined to the highways applied for, but they are not limited to the precise route specified in the application. They may make such variations as they deem proper. The general course of the highway, however, must be preserved. In the assessment of damages the benefits derived from the exclusive use of the lands reverting upon the discontinuance of a highway may be deducted. See next section.

Where an owner of land has acquiesced in the use of it as a highway for fifteen years, he waives the right to have damages assessed before the highway should be opened, worked or used, and he cannot obstruct the highway until assessment is made. *Chapman v. Gates*, 46 Barb. 313 (1866).

**Determination as to damages; evidence.** The commissioners are not limited in determining the award of damages to the evidence presented by the claimants and the authorities, but are entitled to inspect and examine the claims for themselves, and to obtain the opinions and judgments of others, and then to base their determination upon what they deem to be the best result of all these sources of information. *Matter of Commissioners of Central Park*, 54 How. Pr. 313 (1873). Where the commissioners hear no testimony as to the compensation to be paid to the landowner, but act on a view of the premises and their knowledge of it, their determination that the benefits equal the damages, in the absence of bad faith, will not be disturbed. *In re Newland Ave.*, 15 N. Y. Supp. 63, 38 N. Y. St. Rep. 796 (1891).

The court will not interfere with the report as to the amount of damages, unless from proofs exhibited there be a plain and decided preponderance of evidence against the conclusion of the commissioners. *Matter of Furman St.*, 17 Wend. 649 (1836). The judgment of the commissioners enters into the amount of the award for damages, and this will not be set aside as against the evidence. They are not bound to adopt a valuation which an owner puts upon his property, he having in view a special use to which he means to apply his property as some future time. *Matter of Pugh*, 22 Misc. 43, 49 N. Y. Supp. 398 (1897); reversed on other grounds, 46 App. Div. 634, 61 N. Y. Supp. 1145. The findings of commissioners in respect to the amount of damages to be awarded is like the findings of a jury and should only be disturbed by the court in like cases. *Matter of Town of Whitestown*, 24 Misc. 150, 53 N. Y. Supp. 397 (1898); *Matter of Opening Eleventh Ave.*, 49 How. Pr. 208 (1875); *Matter of Commissioners of Central Park*, 54 How. Pr. 313 (1873).

Where there is evidence to support the determination of duly appointed commissioners to the effect that the laying out of the private road as a public highway is a public necessity their determination will be permitted to stand. *Matter of Burdick*, 27 Misc. 298, 58 N. Y. Supp. 759 (1899).

**The measure of damages** is the present market value of the property. All covenants in a lease must be considered and if they enhance the value of the leasehold estate, an award in addition to the present value of the term to the tenant should be made. *Matter of William St.*, 19 Wend. 678 (1839). The abutting owners are not limited to nominal damages, but compensation should be based on the effect a deprivation of the fee will have on the value of abutting property. *In re City of Buffalo*, 15 N. Y. Supp. 775 (1891).

All the owner can ask is that such sum shall be fixed upon as shall be deemed reasonable with reference on the one hand to the damage sustained by him, and on the other hand to the value of the grounds in the new uses to which they may be appropriated in consequence of the opening of the

highway. The use to which the owner has applied the property can be taken into consideration only for the purpose of ascertaining its present value; his intention in relation to its future enjoyment cannot be regarded. He cannot for instance, claim damages sufficient to build a wall to retain his ground in the condition in which he occupied them. *Matter of Furman St.*, 17 Wend. 649 (1836). The damages assessed to the owner, through whose lands a highway has been laid out, must be presumed to be coextensive with the use to which such road may by law be devoted. *Griffin v. Martin*, 7 Barb. 297 (1849).

In assessing the damages the commissioners should determine the effect of the proposed change upon the market value of the premises; they should ascertain the difference between the market value of the premises before the change, and the market value thereof after the change. *Matter of Furman St.*, 17 Wend. 649 (1836). In estimating the damages to be assessed the value of the land taken is not restricted to its agricultural or productive qualities. Every purpose for which the property might be used should be considered and the compensation made should equal the damages sustained. Remote, contingent or speculative damages should not be considered, but they are not confined in making their appraisal to the actual value of the land to be taken, but may consider how the laying out and opening of the road will affect the remainder of the owner's land. If the remainder is left in an inconvenient and unmarketable shape, that fact may be considered in determining the compensation. *Albany N. R. R. Co. v. Lansing*, 16 Barb. 68 (1852).

Nominal damages only may be awarded where a public highway is laid out over lands which are already burdened with a private right of way, and the burden will not be appreciably increased by the new highway. *Matter of Eleventh St.*, 64 App. Div. 609, 71 N. Y. Supp. 824 (1901); *Matter of North Fifth St.*, 64 App. Div. 611, 71 N. Y. Supp. 644 (1901); *In re Village of Olean v. Steyner*, 135 N. Y. 341 (1892); *Matter of Adams*, 141 N. Y. 297 (1894).

To whom damages awarded. The damages pertain to the land to be taken, or to be affected by the laying out, alteration or discontinuance of the highway. The persons entitled to the award are those having an interest in such lands; they may be owners of the fee, lessees, life tenants, or other parties in interest. The commissioners are not required, and the facts before them may not be sufficient, to determine the proportionate rights of all the parties. They are not bound to pass upon conflicting claims of title, but may in such cases report without specifying the names or interests of the owners, but say generally that the land belongs to unknown owners. *Matter of William St.*, 19 Wend. 678 (1839). Widow's dower must be awarded to her for the value of her life estate in the premises; it is erroneous to award it to the estate of her husband and not to her in her own name. *Matter of William St.*, 19 Wend. 678 (1839). An award to the wrong person does not invalidate the proceedings to open the highway; the right person is still entitled thereto. *Mitchell v. Village of White Plains*, 16 N. Y. Supp. 828 (1891).

Where the property is leased, separate awards may be made to both lessor and lessee, but if the lessor is awarded the entire sum, the lessee may recover of the lessor his proportionate share. *Coutant v. Catlin*, 2 Sandf. Ch. 485

(1845). Value of leasehold of a tenant must be valued over and above the rent reserved in the lease, but is subject to no arbitrary rule, and must depend very much upon location, business facilities and state of trade. Matter of Commissioners of Central Park, 54 How. Pr. 313 (1873).

**Certificates of commissioners.** Upon the determination being completed the commissioners must include their findings in a certificate which is to be executed in duplicate. The certificate should contain a description of the highway laid out, altered or discontinued. It should state where the highway commences and where it ends, and its route by courses and distances. The bounds and width of the highway, as well as the courses should be particularly stated, to avoid uncertainty and controversy. One of the certificates must be filed in the town clerk's office and one in the office of the county clerk, together with the minutes and evidence taken by the commissioners.

It is not necessary to the validity of the action of the commissioners that the plaintiff should be named in their report. It is sufficient if it appear that his right to compensation had been considered and adjudicated by them. *Granger v. City of Syracuse*, 38 How. Pr. 308 (1869). Where an authority is conferred upon three commissioners, a majority may act when all attend and take part in the transaction; and although it does not appear by the order that the third participated, the court will presume the fact unless the contrary be shown. *Woolsey v. Tompkins* 23 Wend. 324 (1840); *Hallock v. Woolsey*, id. 328; *People ex rel. Becker v. Burton*, 65 N. Y. 452 (1875). The certificates should show that all the commissioners met and deliberated, or were duly notified, though a majority may decide the issue and sign the certificate. *Chapman v. Swan*, 65 Barb. 210 (1865); *People v. Commissioners of Highways of Seward*, 27 Barb. 94 (1858). Where damages have been assessed and laid before the board of supervisors, who have audited the same, the land owners have a vested right to the sums awarded, and are entitled to mandamus to compel the board to cause the same to be raised and paid to them. *People ex rel. Fountain v. Supervisors of Westchester*, 4 Barb. 64 (1848); *People ex rel. Aspinwall v. Supervisors of Richmond*, 28 N. Y. 112 (1863).

When the assessment is completed, the power of the commissioners is exhausted. They cannot thereafter substitute another; and a paper, purporting to be a revised assessment subsequently filed, has no legal force or validity. *People ex rel. Mann v. Mott*, 60 N. Y. 649 (1875). But see *Matter of Opening Eleventh Ave.*, 49 How. Pr. 208 (1875).

The certificate may be in the following form.

#### FORM No. 63.

##### Certificate of Decision in Favor of Application.

(Title as in Form 53, *ante*.)

The undersigned, by an order of the county court of \_\_\_\_\_ county, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, on the application of John Dorn, having been appointed commissioners to determine as to the necessity of laying out and opening [altering or discontinuing] a highway in the town of \_\_\_\_\_, in said county, beginning [describe highway as in the application] which proposed highway [or highways] crosses the lands of [name the persons] and to assess and damages to be caused thereby;

*Now therefore, we*, the said commissioners, having given due notice of the time and place at which we would meet, and all having met at \_\_\_\_\_, in said town on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, pursuant to such notice, and having taken the constitutional oath of office, and on proof of the service and posting of the notices by the applicant, pursuant to section 195 of the Highway Law, having viewed the proposed highway [or highway proposed to be discontinued or altered] and the lands through which it is proposed to be laid out and opened [altered or discontinued] and having heard the town superintendent of highways and the parties interested therein, and the evidence of all the witnesses produced;

*Now, therefore, we* do hereby determine and certify, that in our opinion it is necessary and proper that the highway be laid out and opened [altered or discontinued] pursuant to the said application of John Dorn, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; and we have assessed the damages required to be assessed by reason of laying out and opening [altering or discontinuing] such highway, as follows:

The damages of N. N. at \$ \_\_\_\_\_; the damages of W. W. at \$ \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

S. S.,

G. G.,

J. J.,

*Commissioners.*

**§ 197. Damages in certain cases; how estimated.**—The owner of lands within the bounds of a highway discontinued may enclose the same and have the exclusive use thereof, and the benefits resulting therefrom may be deducted in the assessment of damages caused by the laying out of a highway through his other lands in place of the discontinued highway.

**Derivation.** This section is derived from former Highway Law, section 87, without change.

Where the same individual will both suffer damage and derive a benefit, the amounts of damage and benefit need not be stated separately, but merely the surplus of one over the other. *Matter of William St.*, 19 Wend. 678 (1839). See cases cited under section 196.

**§ 198. Decision of condemnation commissioners denying application.**—If a majority of the commissioners appointed by the county court shall determine that the proposed highway or alteration is not necessary, or that the highway proposed to be discontinued is not useless, they shall make duplicate certificates to that effect. The costs and expenses necessarily incurred by such commissioners in the proceedings shall be indorsed upon such duplicate certificates, and upon a confirmation of such decision and of the amount of such costs and expenses by the county court,



such costs and expenses not exceeding one hundred dollars shall be payable by the applicants.

**Derivation.** This section is derived from former Highway Law, section 88, as amended by L. 1906, chap. 67, without change.

**Liability for costs,** imposed upon applicants by this section, is to be secured by an undertaking given as provided in section 193. Upon the confirmation of the decision of the commissioners by the county court, as provided in section 199, the amount of costs and expenses, not exceeding the sum of \$100 may be collected by the applicant.

Where an order of a court directs the payment of a sum of money, execution may be issued against the personal property of the party required to pay the same by any party or person to whom such sum of money is made payable by the order. Code Civ. Proc., § 779.

**Costs and expenses.** Where the applicant has already paid costs of parties opposing the application, as fixed by order of the county court, amounting to the sum herein prescribed as the limit of liability, the commissioners appointed to determine upon the necessity of the highway are not entitled to recovery of their fees from him; the commissioners must be deemed to accept their appointments with knowledge of this fact. The provision is of doubtful wisdom, as it would seem to offer an inducement to decide in favor of the opening of a highway for personal reasons, that is, to obtain payment of their fees. *Patton v. Miller*, 28 App. Div. 517, 51 N. Y. Supp. 202 (1898). See cases cited under section 196.

**Certificates of decision denying application** must be executed in duplicate, one of which must be filed in the office of the town clerk and the other, with the minutes and evidence taken by the commissioners, in the county clerk's office. The following form may be used:

#### FORM No. 64.

##### Certificate of Decision of Commissioners Denying Application.

(Title as in Form 53, *ante*.)

The undersigned, by an order of the county court of \_\_\_\_\_ county, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, on the application of John Dorn, having been appointed commissioners to determine and certify as to the necessity of laying out and opening [altering or discontinuing] a highway in the town of \_\_\_\_\_, in said county beginning [describe highway as in the application] which proposed highway [or highways] crosses the lands of [name the persons] and to assess the damages to be caused thereby;

Now, therefore, we, the said commissioners, having given due notice of the time and place at which we would meet, and all having met at \_\_\_\_\_, in said town, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, pursuant to such notice, and having taken the constitutional oath of office, and on proof of the service and posting of the notices by the applicant, pursuant to section 195 of the Highway Law, having viewed the proposed highway [or alteration or highway proposed to be discontinued] and the lands through which it is proposed to be laid out and opened [altered or discontinued], and having heard all the allegations of the town superintendents of highways and the parties interested therein, and the evidence of all the witnesses produced,

do hereby determine and certify that in our opinion such highway [or alteration or discontinuance] is unnecessary and improper and should not be laid out [or should not be made, or such highway should not be discontinued].

Dated this                      day of                      , 19                      .

S. S.,  
G. G.,  
J. J.,

*Commissioners.*

§ 199. **Motion to confirm, vacate or modify.**— Within thirty days after the decision of the commissioners shall have been filed in the town clerk's office, any person interested in the proceeding may apply to the court appointing the commissioners for an order confirming, vacating or modifying their decision, and such court may confirm, vacate or modify such decision. If the decision be vacated, the court may order another hearing of the matter before the same or other commissioners. If no such motion is made, the decision of the commissioners shall be deemed final. Such motion shall be brought on upon the service of papers upon adverse parties in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein; and the decision of the county court shall be final, excepting that a new hearing may be ordered as herein provided, and excepting that any such decision may be reviewed on appeal upon questions affecting jurisdiction, and rulings and exceptions made and taken upon the hearing before the commissioners. If the final decision be adverse to the applicant, no other application for laying out, altering or discontinuing the same highway shall be made within two years.

**Derivation.** This section is derived from former Highway Law, section 89, as amended by L. 1895, chap. 716; L. 1899, chap. 703; L. 1904, chap. 353, and L. 1907, chap. 50.

**Under the former practice,** when the owner of the land did not consent, a jury was required first to certify to its necessity; from this an appeal might be taken to the County Court, and the same question was again determined by three referees. The damages were then assessed by the commissioners appointed by the court, and, an appeal being taken, the same question was again determined by a jury from another town, so that these questions might be litigated before two juries, three referees and a commission, practically four distinct tribunals. Since the enactment of the Highway Law in 1890 these questions have been determined in a proceeding before commissioners, subject to a review by the county court. *Matter of Lawton*, 22 Misc. 426, 50 N. Y. Supp. 408 (1898).

**Certiorari to review decision of commissioners.** In the absence of a statutory provision to review the decision of commissioners to lay out, alter or

discontinue highways such decision could be reviewed by certiorari. *People ex rel. Dexter v. Mosier*, 56 Hun, 64, 8 N. Y. Supp. 621 (1890). The statute here provides a method of reviewing such a decision, and excludes the remedy by certiorari. If an interested party is dissatisfied with the decision he must seek his remedy under this section. See *Beardslee v. Dolge*, 143 N. Y. 160 (1894).

The language of the section is broad enough to empower the county court, upon a motion to confirm or vacate the report of the commissioners, to review all the proceedings, whether such proceedings relates to the merits of the application or otherwise; and upon such motion the County Court may review all questions that can be brought before the Supreme Court by a writ of certiorari. The purpose of section 2122 of the Code of Civil Procedure is to deny the writ of certiorari where the action of the inferior body can be adequately reviewed by a higher tribunal on appeal; the action of the county court is an appeal such as is contemplated by the Code, and hence certiorari will not lie. *People ex rel. Hanford v. Thayer*, 88 Hun, 136, 34 N. Y. Supp. 592 (1895); *Matter of Lawton*, 22 Misc. 426, 50 N. Y. Supp. 408 (1898).

**Modification of decision as to compensation for property.** The provisions of the Constitution, Article 1, § 7, require that the compensation for property taken for public use shall be ascertained by a jury, or by three commissioners appointed by a court of record. This precludes the court from modifying the decision of the commissioners as to the amount of damages awarded for land taken. To allow the court on appeal, to increase or diminish the award is to take the question from the constitutional tribunal and to violate the fundamental law. *Matter of Village of Middletown*, 82 N. Y. 196 (1880). Under this section the County Court has no power or authority to interfere with the findings or decision of the commissioners upon the question of damages. That is purely a question for the commissioners to decide. *Matter of Feeney*, 20 Misc. 272, 45 N. Y. Supp. 830 (1897); *Matter of Carpenter*, 11 Misc. 690, 32 N. Y. Supp. 826 (1895); *Matter of Furman St.*, 17 Wend. 649 (1836).

**The motion to confirm, vacate or modify the decision of the commissioners** must be upon notice served at least eight days before the time appointed for the hearing; unless the county judge makes an order to show cause why the application should not be granted and, in the order, directs that service thereof less than eight days before it is returnable, be sufficient. Code of Civ. Proc. § 780. The motion is to be made before the County Court, and such court is always open for such purpose. Code of Civ. Proc. § 355. The notice of motion must be personally served upon the adverse party in the proceedings. Such service should be made in the manner provided in section 796 of the Code of Civil Procedure.

The act gives the landowner two opportunities to be heard, first before the commissioners, and second (if the decision be adverse), before the County Court, on an application to vacate or modify the proceeding. The application to the County Court is in the nature of a rehearing upon which new proofs may be presented bearing upon the questions in controversy. *Matter of De Camp*, 151 N. Y. 557 (1897); *Rector v. Clark*, 78 N. Y. 21 (1879).

**Time for making application.** This section requires the application for an order to confirm, vacate or modify the decision of the commissioners to be

made within thirty days after the decision is filed in the office of the town clerk. The object of the section is to allow interested parties, who desire to apply to the court for an order vacating or modifying the decision of the commissioners, the period of thirty days within which to institute the application or motion. But it is not the purpose of the section to require the application or motion to be actually made or heard in court within that time. *Matter of Glenside Woolen Mills*, 92 Hun, 188, 36 N. Y. Supp. 593 (1895). A service of the notice of motion within thirty days after the filing of the decision is sufficient, under the above section, although the motion is not returnable until after the expiration of such thirty days. *Matter of Thompson*, 85 App. Div. 221, 83 N. Y. Supp. 209 (1903).

**Parties to proceedings.** The right to appeal from an order of the commissioners may be exercised not only by those through whose land the road proposed to be built or discontinued runs, but by every resident taxpayer of the town. *Matter of Coe*, 19 Misc. 549, 44 N. Y. Supp. 910 (1897); *People ex rel. Ridgeway v. Cortelyou*, 36 Barb. 164 (1862).

It is proper that the petitioner, an owner of land through which the road is to pass, be made a party defendant as a person specially interested; the town superintendent of the town has no more interest than any other taxpayer and is not properly made a party; the town may be made a party, but it must be done by the court before the certiorari is brought to a hearing, and not by the appellate court. *People ex rel. D., L. & W. R. R. Co. v. County Court*, 92 Hun, 13, 37 N. Y. Supp. 869 (1895), affirmed, 152 N. Y. 214. See Code of Civil Procedure § 2137. The right of the owner of land through which the highway is to be laid out to make the application is personal to such owner. His private rights cannot be affected by an application in behalf of any other person through whose land the same road may also have been laid. If there be several owners, each owner may apply for himself. *Clark v. Phelps*, 4 Cow. 190 (1825).

**Notice of motion** must be served as in any other special proceeding in the same court. The section provides that "such motion shall be brought on upon the service of papers upon adverse parties in actions and special proceedings pending therein."

Notice must be given to the occupant of the land through which the road is to pass; and his attendance as a witness before the judge will not be deemed a waiver of the notice. *People ex rel. Edick v. Judge of Herkimer*, 20 Wend. 186 (1838).

**Grounds of motion.** The Highway Law does not seem to point out very clearly the questions which may be passed upon in reviewing the decision of the commissioners nor the extent or scope of such review, except as it can be inferred from the character of the proceedings, the general language of the statute, and its scope and purpose. *Matter of Lawton*, 22 Misc. 426, 50 N. Y. Supp. 408 (1898). This section does not in terms provide that the court may modify any award of damages, and the construction of the general terms used as to the right to modify the decision of the commissioners would be that the county court could modify the decision only to the extent which the Constitution would permit and not make a modification that would violate the Constitution which provides that the assessment be made by the commissioners. *People ex rel. Hanford v. Thayer*, 88 Hun, 136, 34 N. Y. Supp. 592 (1895). The commissioners have no authority to so depart from the route

stated in the petition as to warrant the assumption that the preliminary proceedings have been totally disregarded. *Matter of Feeney*, 20 Misc. 272, 45 N. Y. Supp. 830 (1897).

The County Court, in reviewing the decision of the commissioners, should determine the question on the certificate and upon such evidence as may be taken by the court, or, in other words, there must be a retrial of the question before the court if the matter is there contested. It is not necessary that it appear by the record that all of the preliminary steps, which it is required should be taken to authorize the adjudication, were actually and duly taken; action upon an allegation that a certificate had been made can be taken in the absence of a denial of the allegation by the landowner. *Matter of James*, 43 Hun, 67 (1887).

On appeal from the decision of the commissioners in refusing to lay out a road the court has no authority to entertain an objection to the regularity of the proceedings anterior to the decisions of the commissioners. Commissioners of Warwick v. Judges of Orange County, 13 Wend. 432 (1835).

An owner who appears and is heard before the commissioners without objecting to their jurisdiction because of the omission to serve notice upon him cannot raise the objection on appeal from the decision of the commissioners. *People ex rel. Becker v. Burton*, 65 N. Y. 452 (1875).

**Power of county court to vacate or modify.** The county court has no power to modify the report of the commissioners in regard to the width of the highway. *Matter of Feeney*, 20 Misc. 272, 45 N. Y. Supp. 830 (1897). Where a county court, upon an appeal from the decision of commissioners appointed under this article of the Highway Law, modifies the decision of the commissioners in a manner not asked for by either party, and affirms the decision as thus modified, the modification of the county court should be stricken out. *Matter of Sly*, 177 N. Y. 465 (1904).

The county court may appoint successive commissions until it is satisfied that the statute has been complied with, and thereby no provision of the Constitution is violated if the commissioners are of the right number and appointed by the proper authority. *Schneider v. City of Rochester*, 90 Hun, 171, 35 N. Y. Supp. 786 (1895).

County judge is not "incapable to act," within the meaning of section 342 of the Code of Civil Procedure when voluntarily absent from the State; and when proceedings to confirm the order of the commissioners is removed to the Supreme Court under such circumstances, that court is powerless to act thereon. *Matter of Munger*, 10 App. Div. 347, 41 N. Y. Supp. 882 (1896).

**Appeal from order of County Court.** Prior to the revision of 1890 the order of the county judge confirming the report of the commissioners was not a final determination that could be adequately reviewed by appeal and hence *certiorari* would lie. *People ex rel. Hanford v. Thayer*, 88 Hun, 136, 34 N. Y. Supp. 592 (1895); *People ex rel. Titsworth v. Nash*, 15 N. Y. Supp. 29, 38 N. Y. St. Rep. 730 (1891). Although the section as it now stands makes the decision of the County Court final as to the question of the necessity of the proposed highway and the compensation of the landowner, yet its decision may be reviewed on questions affecting the power and jurisdiction of the County Court. *People ex rel. D. L. & W. R. R. Co. v. County Court*, 152 N. Y. 214 (1897); *Matter of De' Camp*, 151 N. Y. 557 (1897); *Matter of Barrett*, 7 App. Div. 482, 40 N. Y. Supp. 266 (1896).

It was clearly the intention to make the review of proceedings by the County Court final, without respect to the question whether such highway was located in one or more towns, provided it did not extend into an adjoining county. *Matter of Taylor*, 8 App. Div. 395, 40 N. Y. Supp. 839 (1896). An order of the County Court confirming the decision of the commissioners will be affirmed, though another route proposed by contestant would be somewhat less expensive. *In re Union Ave.*, 30 N. Y. St. Rep. 366, 8 N. Y. Supp. 718 (1890).

The decision of the county court confirming the decision of commissioners that the proposed highway is a public necessity, is final and cannot be reviewed by the Appellate Division. *Matter of Mitchell*, 85 App. Div. 277, 83 N. Y. Supp. 211 (1903), affirmed 177 N. Y. 560; *People ex rel. Miller v. Griswold*, 67 N. Y. 59 (1876); *People ex rel. Bristol v. Nichols*, 51 N. Y. 474 (1873) *Citizens' Savings Bank v. Town of Greenburgh*, 173 N. Y. 215, 229 (1903).

Where an appeal from an order of a County Court, confirming the report of the commissioners, is pending undetermined in the Appellate Division, the County Court has no power to compel such commissioners to make a further return of the evidence taken before them. *Matter of Baker*, 54 App. Div. 21, 66 N. Y. Supp. 242 (1900).

An appeal by a landowner from an order of the County Court, confirming an order of commissioners directing the laying out of a highway, there can be raised and considered such questions as whether the order of the commissioners contained a sufficient description of the proposed highway, and whether it was competent for the County Court, after having reached the conclusion that the damages awarded were inadequate to determine the amount by which they should be increased, or whether the landowner was not then entitled to have the case sent back for reassessment. *Matter of De Camp*, 151 N. Y. 557 (1897).

A writ of *certiorari* brought to review an order of a County Court affirming a report of the commissioners, on the ground of alleged irregularities in the proceedings affecting the power and jurisdiction of such County Court, is properly dismissed under sections 2121, 2122 of the Code of Civil Procedure, as the decision in regard to such questions may be reviewed on appeal. *People ex rel. D., L. & W. R. Co. v. County Court*, 152 N. Y. 214 (1897); *Matter of Taylor*, 8 App. Div. 395, 40 N. Y. Supp. 839 (1896); *People ex rel. Ridgeway v. Cortelyou*, 36 Barb. 164 (1862). A writ of *certiorari*, under the Code of Civil Procedure, section 2121, cannot issue to review a determination in a civil action or special proceeding by a court of record or a judge thereof. *Beardslee v. Dolge*, 143 N. Y. 160 (1894).

A reversal of a decision not to lay out a highway is not an order to do so; and the commissioners cannot be compelled to by mandamus. *People ex rel. Babcock v. Commissioners of Cherry Valley*, 8 N. Y. 476 (1853).

Effect of final order. The road cannot be opened until the appeal is determined, although the court refuses to proceed to decide the same, under the supposition that they have not jurisdiction of the case. *Lansing v. Caswell*, 4 Paige, 519 (1834); *Clark v. Phelps*, 4 Cow. 190 (1825). A property owner acquires no vested rights in an award for property condemned for a street until final confirmation of the report of the commissioners of appraisal. So

where proceedings are discontinued before such confirmation. *Schneider v. City of Rochester*, 90 Hun, 171, 35 N. Y. Supp. 786 (1895).

Forms of notice of motion and of the order of the court confirming, modifying or vacating the decision of the commissioners may be as follows:

**FORM No. 65.**

**Notice of Motion.**

(Title as in Form No. 53.)

*To Jacob Smyth; Levi Brown and Samuel Jones:*

Take notice that an application will be made to this court at a term thereof, to be held at the \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, for an order confirming [vacating or modifying] the decision of the commissioners in the above entitled matter, which decision is dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, [if motion is to modify decision state particulars] and for such other and further relief as to the court may seem proper; that said application will be made upon said decision and upon the affidavits and papers, with copies of which you are herewith served.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

*JOHN DORN.*

**FORM No. 66.**

**Order Confirming, Modifying or Vacating Decision.**

At a term of the \_\_\_\_\_ County Court, held at the \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Present—Hon. E. E., County Judge.

(Title as in Form No. 53.)

On reading and filing the decision of the commissioners, S. S., G. G. and J. J., in the above entitled matter, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by which it appears [state substance of decision], with proof of due service upon N. N. and W. W. of notice of this application and [state other papers], and on motion of A. D., counsel for John Dorn, after hearing B. B., counsel for N. N. and W. W., opposed, and on reading [name the papers];

*It is hereby ordered* that the said decision be and the same is hereby confirmed [or vacated, or modified or corrected as follows: state how], with costs amounting to \$ \_\_\_\_\_ in favor of \_\_\_\_\_ and against \_\_\_\_\_.

E. E.,

*County Judge.*

**Laying out highway after decision.** If the application be made for the laying out of a highway, and the commissioners appointed as provided in the preceding sections decide that the proposed highway is necessary and should be laid out and opened, and their decision has been confirmed by the County Court, or where the decision of such commissioners is final and no motion has been made to confirm, vacate or modify it, the town superintendent should proceed to lay out the highway in accordance with the decision, by filing and recording in the town clerk's office his final order. Such order may be in the following form:

## FORM No. 67.

**Final Order of Town Superintendent Laying Out Highway.**

*Whereas*, John Dorn did present to me, as town superintendent of highways of the town of \_\_\_\_\_, a written application, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, to lay out a highway in said town; and

*Whereas*, Commissioners were appointed by the County Court of said county, pursuant to section 194 of the Highway Law, and, after having duly met, certified their decision to the effect that such proposed highway was necessary and proper and should be laid out and opened, and assessed the damages therefor; and the said County Court having confirmed the decision of the said commissioners [or, no motion having been made to the County Court to confirm, vacate or modify such decision], which said application, orders and certificate [or other papers] having been duly filed in the office of the town clerk of said town, to which reference is here made.

*Now, therefore*, I, the undersigned town superintendent of highways of said town, pursuant to section 199 of the Highway Law, do hereby lay out such highway as so applied for and ordered, and of which highway a survey has been made as follows: Beginning [here insert survey bill], and the line of such survey shall be the center of the highway, which is to be \_\_\_\_\_ rods in width.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of town superintendent of highways.]

§ 200. **Limitations upon laying out highways.**—No highways shall be laid out less than three rods in width, nor through an orchard of the growth of four years or more, or any garden cultivated as such for four years or more, or grape vineyards of one or more years' growth, and used in good faith for vineyard purposes, or buildings or any fixtures or erections for the purposes of trade or manufactures, or any yard or enclosure necessary to the use and enjoyment thereof, without the consent of the owner or owners thereof, unless so ordered by the county court of the county in which the proposed highway is situated; such order shall be made on the certificate of the town superintendent of the town or towns in which the proposed highway is situated, showing that the public interest will be greatly promoted by the laying out and opening of such highway, and that commissioners appointed by the court have certified that it is necessary; a copy of the certificate with eight days' notice of the time and place of the hearing before the county court shall be served on the owners of the land, or if they are not residents of the county upon the occupants; the county court upon such certificates, and the proofs and other proceedings therein, may order the highway to be laid out and opened, if it deems it necessary and proper. The town superintendent shall then present the order of the county court, with the certificate and



proofs upon which it was granted, certified by such court, to the appellate division of the supreme court in the judicial department in which the land is situated upon the usual notice of motion, served upon the owner or occupant, or the attorney who appeared for them in the county court. If such appellate division of the supreme court shall confirm the order of the county court, the town superintendent shall then lay out and open such highway as in other cases. The provisions of this section shall not apply to vineyards planted or to buildings, fixtures, erections, yards or enclosures, made or placed on such land after an application for the laying out and opening the highway shall have been made. In case the highway to be laid out shall constitute an extension or continuation of a public highway already in use, and shall not, as to such new portion, exceed half a mile in length, the town superintendent may lay out such extension or continuation of a width of not less than three rods, provided, however, that it be not less than the widest part of the highway of which it is an extension or continuation. In such case the town superintendent shall specify in his certificate the precise width of the new portion of such highway, and shall certify that such width is as great at least as the widest part of the highway of which it is a continuation or extension. No highway shall be laid out which shall be identical or substantially so with a highway previously discontinued or abandoned for public purposes within seven years of such discontinuance or abandonment, in counties adjoining cities with upward of one million inhabitants.

**Derivation.** This section is taken from former Highway Law, § 90, as amended by L. 1906, chap. 265.

**Limitations specified.** This section is for the purpose of restricting the laying out of a highway through tracts or parcels of land used for certain purposes, without the consent of the owner of the land unless ordered by the County Court of the county. The following are the cases in which such consent or special order must be secured:

1. An orchard of the growth of four years or more.
2. A garden cultivated as such for four years or more.
3. A grape vineyard of one or more years growth and used in good faith for such purpose.
4. Buildings or any fixtures or erections for the purpose of trade or manufactures, or any yard or inclosure necessary to the use and enjoyment thereof.

In addition to the cases above enumerated, the following restrictions are imposed upon laying out highways:

1. Through burying-grounds unless the remains therein have been removed, as provided in section 201.

2. Lands held by soldiers' monument associations except by special permission of the Legislature. L. 1866, chap. 273, § 6.

3. Lands dedicated to cemetery purposes except by special permission by the Legislature. L. 1847, chap. 133.

**Order of court.** If the consent of the owner of such lands is not granted the town superintendent is authorized to secure an order of the County Court based upon the findings of the commissioners already appointed in proceedings to determine the necessity of a highway upon facts presented showing that the public interests will be promoted by the laying out and opening of the highway. The order of the County Court is not conclusive until confirmed by the Appellate Division of the Supreme Court. The procedure to be followed to secure such confirmation is prescribed in this section.

**Width of highway.** Every highway laid out as provided in this article must be at least three rods in width, that is, lands of such width must be set apart for use as a highway. This section also authorizes an extension of an existing highway at a less width than three rods. Where a highway is dedicated to a town for highway purposes and a highway is laid out thereon, it must not be less than two rods in width.

Under this section the commissioners may not lay out a highway less than three rods in width, without the approval of the County Court and the Appellate Division, except in the case of the extension of a highway already in use, in which case the highway to be laid out must come within the terms of the exception. *Matter of Adolph*, 102 App. Div. 371, 92 N. Y. Supp. 841 (1905). The failure of the commissioners to comply with section 200 of the statute by designating the width of the highway is a defect which the County Court has no power under section 199 to correct. *Matter of Feeney*, 20 Misc. 272, 45 N. Y. Supp. 830 (1897). Where the order of the commissioners appointed by the court omits to state the width of the road, it is too indefinite to be of any force, although when the starting point, courses, distances and terminus have been given as a center line, perhaps the width, to-wit, three rods may be inferred. *People ex rel. Waters v. Diver*, 19 Hun, 263 (1879); *Lawton v. The Commissioners*, 2 Cai. 178 (1804); *People ex rel. McFarland v. The Commissioners*, 1 Cow. 23 (1823); *Hallock v. Woolsey*, 23 Wend. 328 (1840). An order to lay out a road, for a part of the distance, three rods in width, and the residue over the bed of an old road, which is but two rods wide, is valid. *Snyder v. Plass*, 28 N. Y. 465 (1864); *Snyder v. Trumbour*, 38 N. Y. 355 (1868).

**Consent of owners of lands.** If the owner of lands used as an orchard, garden, vineyard or for trade purposes, consents to the laying out of a highway through the same, an order of the court is not necessary for such purpose. The oral consent of the owner of lands used for such purpose has been held sufficient, provided the highway officer acts upon it immediately, and the road is laid out before the consent is revoked. *People ex rel. Bodine v. Goodwin*, 5 N. Y. 568 (1851); *Noyes v. Chapin*, 6 Wend. 461 (1831); *People ex rel. Martin v. Albright*, 14 Abb. Pr. 305 (1862). A sale and conveyance of the land in good faith before the road is laid out would operate as a revocation. If the commissioners had acted upon the faith of the verbal consent the owner would be estopped from denying the legality of the act. *Marble v. Whitney*, 28 N. Y. 298 (1863).

Either the consent of the owner or the certificate of the town superintendent is essential to the laying out of a highway through buildings. *People ex rel.*

*Sammiis v. Supervisors*, 58 Hun, 371, 12 N. Y. Supp. 21 (1890). The consent of the owner must be free and voluntary, with intent to dedicate. *Gould v. Glass*, 19 Barb. 179 (1855).

Where the owner of the land consents to the taking of the same and files a release of damages in the town clerk's office, it is unnecessary that the necessity of the alteration of the road be certified to by commissioners appointed by the County Court. *People ex rel. Dorn v. Jones*, 2 T. & C. 360 (1873); *People ex rel. Wolford v. Strevell*, 27 Hun, 218 (1882). A release for damages signed by the owners is sufficient evidence of the giving of their consent to the laying out of the highway through their inclosed grounds. *McCarthy v. Whalen*, 19 Hun, 503 (1880).

**Gardens and orchards.** A garden is a piece of ground appropriated to the cultivation of herbs or plants, fruits and flowers. It is usually a small plot of ground near a dwelling-house, and used in connection therewith. To have the protection of the statute it must have been cultivated for four years. It is not sufficient that the land through which the road is to pass be inclosed with a garden, but it must be part of the cultivated garden or essential to its use. *People ex rel. Cooke v. Commissioners of Highways of Greenburgh*, 57 N. Y. 549 (1874); *People ex rel. Stanton v. Horton*, 8 Hun, 357 (1876). Whether the land over which the road is to extend is a garden is a question of fact to be decided by the commissioners appointed by the court; such finding is final and will not be reviewed on certiorari. *People ex rel. Clinch v. Moore*, 15 N. Y. Supp. 504, 39 N. Y. St. Rep. 8811 (1891); affirmed 129 N. Y. 639.

There is no invasion of an orchard when none of the trees come within the survey, and the owner is not deprived of the beneficial use and enjoyment of any of his trees by the opening of the highway. *Snyder v. Plass*, 28 N. Y. 465 (1864); *Snyder v. Trumbour*, 38 N. Y. 355 (1868). It does not follow that the whole field is an orchard, because there are fruit trees in some part of it; the trees must be so near as to be harmed by the opening of the road. *People ex rel. Seward v. Judges of Dutchess*, 23 Wend. 360 (1840). In prosecution for assault, defendant may prove ownership of premises and that he was resisting the opening of a highway through his orchard without his consent. *Harrington v. People*, 6 Barb. 607 (1849).

Where a proposed road will run through orchards, house inclosures and a school yard; where it will benefit few persons and those but slightly, the cost will be heavy, and the present road is sufficient, consent to its opening should not be granted. *Matter of Four Corner Road*, 37 N. Y. St. Rep. 711, 13 N. Y. Supp. 458 (1891).

**Trade fixtures and erections.** Neither a public nor a private road or way can be laid out across the fixtures and erections upon the inclined plain of a railroad which were used for the drawing up or letting down of cars. *Mohawk & Hudson Railroad Co. v. Artcher*, 6 Paige, 83 (1836).

The ditch or canal by which water is conducted to a mill is not a building, fixture or erection within the meaning of the statute; a highway may be laid along it, comprehending it in whole or in part within the limits of the highway; but if necessary to work the road to its entire width, it must be by so constructing a roadway over the channel as not to obstruct the flow of water. *People ex rel. Williams v. Kingman*, 24 N. Y. 559 (1862). The fact that after a highway has been laid out by the town superintendent, the owner or occupant of the land placed buildings upon the route of the road, furnishes

no obstacle to opening the road and presents no question upon appeal from the decision of the commissioners appointed by the County Court. *People ex rel. Hubbard v. Harris*, 63 N. Y. 391 (1875); *Carris v. Commissioners of Highways of Waterloo*, 2 Hill, 443 (1842).

**Railroad property.** A highway cannot be laid over grounds acquired by a railroad for depots and engine houses and for railroad purposes generally. *Pros. Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552 (1883); *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345 (1862). Where highway commissioners sought to acquire lands for highway purposes through land acquired by a railroad company for depot purposes it was held that an injunction was the proper remedy, it being impossible to open the highway through the plaintiff's land without his consent. *Prospect Park & C. I. R. R. Co. v. Williamson*, 10 Wkly. Dig. 257 (1883).

**Yards and inclosures.** The provision of the statute prohibiting the laying out of a road through yards or inclosures, extends as well to yards and inclosures necessary to the use and enjoyment of a dwelling-house as to those connected with "fixtures or erections for the purpose of trade or manufacture." *Ex parte Clapper*, 3 Hill, 458 (1842). Commissioners laying out a highway through a yard, etc., are liable to the owner in trespass. *Beardslee v. Dolge*, 143 N. Y. 160 (1894); *Clark v. Phelps*, 4 Cow. 190 (1825); *Harrington v. People*, 6 Barb. 607 (1849). So where they have not acquired jurisdiction through some defect in appointment, qualifications, etc. *People ex rel. Ottman v. Commissioners of Highways of Seward*, 27 Barb. 94 (1858). It is only such yards or inclosures as are necessary to the use and enjoyment of the dwelling-house or the manufacturing establishment through which the town superintendents are prohibited from laying out a highway. *Lansing v. Caswell*, 4 Paige, 519 (1834); *Clark v. Phelps*, 4 Cow. 190 (1825); *People ex rel. Miller v. Comes*, 1 Hun, 530 (1874). The statute expressly deprives the town superintendent of jurisdiction where the road passes through a yard, and provides for a proceeding before the county judge to be confirmed by the Appellate Division. *Beardslee v. Dolge*, 143 N. Y. 160 (1894).

Ground adjoining a sawmill and used for piling logs, but whose limits are not fixed by fences or other visible marks, nor by definite occupation, is not within the statute; it is the duty of the town superintendents in laying out a highway over such ground to leave a sufficient area for the use of the mill owner, and their discretion as to the quantum is not reviewable. *People ex rel. Williams v. Kingman*, 24 N. Y. 559 (1862).

**Procedure in court; parties.** This section should be construed so as to make the procedure harmonize with procedure in other proceedings for the review of questions of fact by county courts, and so as to best protect the rights of the public and the landowner, and, therefore, the county court should determine the question on the certificate, and upon such evidence as may be taken by him, or in other words, there must be a retrial of the question before the county court if the matter is there contested by the landowner. This section does not prescribe that the evidence and the proceedings had before the county court shall be presented to the Appellate Division with the order, but without the evidence the Appellate Division is without means of determining the rights of the parties. It not being the practice of the latter court to retry questions of fact it is intended that the hearing in that court should be upon the evidence taken and the proceedings had before the county court. *Matter of James*, 43 Hun, 67 (1887).

Where the necessity of the highway is not contested, the report of the commissioners in favor of a route which will make a direct line with another existing highway will be confirmed, although another route making a zigzag course would be cheaper. *Matter of Union Ave.*, 30 N. Y. St. Rep. 366, 8 N. Y. Supp. 718 (1890). The commissioners making an award under this section view the premises and see the witnesses and can better judge of the amount of damages sustained than the Appellate Division, and unless some error in law is manifest their award will not be disturbed. *Matter of Main St.*, 54 N. Y. St. Rep. 936, 25 N. Y. Supp. 267 (1893); *People ex rel. Cook v. Hildreth*, 24 N. Y. St. Rep. 458, 5 N. Y. Supp. 308 (1889).

Commissioners cannot be compelled to state the facts upon which they base their conclusion that the road does not run through premises exempt by the statute. *People ex rel. Lovell v. Melville*, 7 Misc. 214, 27 N. Y. Supp. 1101 (1894).

This proceeding before the county court and Appellate Division is between the town superintendent and the owner of the land; the public have no notice of it and take no part in it. Its purpose is to remove, if it shall be right to do so, the obstacle of the owner's nonconsent. This removed the town superintendent proceeds as if he had that consent. *People ex rel. Banner v. Temple* 27 Hun, 128 (1882). As to whether land owners whose buildings, enclosures, etc., are not affected by the proposed highway can oppose the granting of an order by the county court, see *Matter of Oakley Ave.*, 85 Hun, 446, 32 N. Y. Supp. 1146 (1895).

The town superintendent can make no order laying out a road until after the decision of the Appellate Division upon the county court's order affirming the commissioner's certificate. *People ex rel. Banner v. Temple*, 27 Hun, 128 (1882).

The following forms will be found useful under this section. Before application is made to the County Court for an order laying out a highway through the lands described in this section, an effort should be made by the town superintendent to secure the consent of the owner. This consent may be in the following form:

**FORM No. 68.**

**Consent to Lay Out Highway Through Certain Lands.**

*Whereas*, John Dorn, has made application in writing to the town superintendent of highways of the town of . . . . ., in the county of . . . . ., dated the . . . . . day of . . . . ., 19. . . ., to lay out a highway in said town beginning at [here insert description of highway], and which said highway will pass through an orchard [or garden, vineyard, enclosure, yard, etc.] owned by me.

*Now, therefore*, I do hereby consent that such highway be so laid out, opened, worked and used through such orchard [or garden, etc.], owned by me, and do hereby bind myself, assigns and heirs to and by such consent; provided, however, that such consent shall not be construed as a waiver or release of my claim for damages by reason of the laying out of such highway.

In witness whereof I have this . . . . . day of . . . . ., 19. . ., affixed my hand and seal.

THOMAS WOOD.

[Acknowledgment as in Form No. 50.]

Where a consent is given as above provided, the town superintendent may make an order laying out the proposed highway through the lands of the owner who has consented. Such order may be in the following form:

**FORM No. 69.**

**Order of Town Superintendent Laying Out Highway Through Orchard, Etc.,  
on Consent of Owner.**

*Whereas*, John Dorn presented a written application to the undersigned, town superintendent of highways of the town of . . . . ., county of . . . . ., dated the . . . . . day of . . . . ., 19.., to lay out a highway described as follows [describe highway as in application] which passes through the orchard [or garden, vineyard, enclosure] of Thomas Wood, and the said Thomas Wood having consented that such highway be laid out through such orchard [or as the case may be].

*Now, therefore*, the undersigned, town superintendent of highways of such town, does hereby, pursuant to section 200 of the Highway Law, lay out said highway as so applied for, whereof a survey has been made as follows: Beginning [here insert survey bill], and the line of survey is to be the center of the highway, which is to be . . . . . rods in width.

Dated this . . . . . day of . . . . ., 19..

[Signature of town superintendent of highways.]

The certificate of the town superintendent as to the necessity of laying out a highway through an orchard, vineyard, yard or enclosure must be presented to County Court, together with the proceedings had before commissioners appointed by the court to lay out such highway. Such certificate may be in the following form:

**FORM No. 70.**

**Certificate of Town Superintendent as to Necessity of Laying Out Highway  
Through Orchard, Etc.**

(Title as in Form No. 53.)

The undersigned, town superintendent of highways of the town of . . . . ., in said county, hereby certify that on the . . . . . day of . . . . ., 19.., John Dorn, who is liable to be assessed for highway taxes in said town, made a written application to me as such superintendent to lay out a highway in said town, passing through an orchard of Thomas Wood, of the growth of four years or more, pursuant to section 200 of the Highway Law, as follows: [Insert a copy of the application.] And that the said Thomas Wood does not consent thereto; that the following proceedings were had upon such application: [Describe the proceedings up to and including the decision of the commissioners appointed by the courts.] We further certify that the public interest will be greatly promoted by the laying out and opening of such highway through said orchard; and commissioners appointed by this court have certified that such highway is necessary and proper, and have assessed the damages of Thomas Wood by reason thereof, at \$————

Dated this . . . . . day of . . . . ., 19..

[Signature of town superintendent of highways.]

The order of the County Court laying out a highway through an orchard, vineyard, garden, yard or enclosure may be in the following form:

**FORM No. 71.**

**Order of County Court Laying Out Highway Through Orchard, Etc.**

At a term of the ..... County Court, held at ....., in the ..... of ....., on the ..... day of ....., 19..

Present—Hon. E. E., County Judge.

(Title as in Form No. 53.)

Upon reading and filing the certificate of ....., town superintendent of highways of the town of ....., in the county of ....., dated the ..... day of ....., 19.., stating [here state the substance of the facts in the certificate] with proof of due service of notice of this motion, and upon reading the [state what papers], and after hearing A. D., of counsel for the applicant, and B. B., of counsel for Thomas Wood, opposed;

*It is hereby ordered* that said highway be laid out and opened pursuant to section 200 of the Highway Law, with ten dollars costs of this cotion.

E. E.,

*County Judge.*

The order of the Appellate Division made upon the order of the County Court certified by such court, may be in the following form:

**FORM No. 72.**

**Order of Appellate Division.**

In the Appellate Division of the Supreme Court, in the ..... department, held at the court house, in the city of ....., on the ..... day of ....., 19..

Present—Hon. H. R., P. J.; Hon. B. D., Hon. C. E., Hon. F. G., and Hon. A. J., Justices of the Supreme Court.

(Title as in Form No. 53.)

....., town superintendent of highways of the town of ....., in the county of ....., having presented to us the order of the County Court of ..... county, dated the ..... day of ....., 19.., that a highway be laid out in said town, passing through the orchard of Thomas Wood, of the growth of four years or more, pursuant to section 200 of the Highway Law, the said Thomas Wood, not consenting thereto, with the certificate and proofs upon which the said order was granted, duly certified by such court, with proof of due service of notice of this motion on the said Thomas Wood, and after hearing B. B., of counsel for the applicant, on the motion, and X. B., of counsel for Thomas Wood, opposed;

*It is hereby ordered* that the said order of such County Court be, and the same is hereby confirmed, with \$. ..... costs of this motion.

After the order of the County Court has been confirmed by the Appellate Division, the town superintendent is required to lay out and open the highway as in other cases. He should make and file in the office of the town clerk an order in the following form.

## FORM No. 73.

**Order of Town Superintendent Laying Out Highway Through Orchard, Etc.,  
Upon Order of Appellate Division.**

*Whereas*, John Dorn made a written application to the undersigned, town superintendent of highways of the town of ....., county of ....., dated the ..... day of ....., 19.., to lay out a highway in such town, which passes through the orchard [or garden, vineyard, yard or inclosure] of Thomas Wood [if an orchard or vineyard, add, of the growth of four years or more], and proceedings having been had thereon as provided in section 200 of the Highway Law; and

*Whereas* in such proceedings the County Court of such county has ordered such highway to be laid out and opened through such orchard [garden, vineyard, etc.], by order dated the ..... day of ....., 19.., which order was duly confirmed by an order of the Appellate Division of the Supreme Court in the ..... Department by an order dated the ..... day of ....., 19.., which application, certificates, orders and other papers in said proceedings have been duly filed in the office of the town clerk of said town, to which reference is here made, now therefore,

*It is hereby ordered* by the undersigned, town superintendent of highways of such town, pursuant to section 200 of the Highway Law, that the following described highway be and the same is hereby laid out and opened, as directed in the said order of the County Court as confirmed by the said Appellate Division: Beginning [here insert survey bill], and the line of survey to be the center of the highway, which is to be ..... rods in width.

Dated this ..... day of ....., 19..

[Signature of town superintendent of highways.]

**§ 201. Laying out highways through burying-grounds.**—No private road or highway shall be laid out or constructed upon or through any burying-ground, unless the remains therein contained are first carefully removed, and properly reinterred in some other burying-ground, at the expense of the persons desiring such road or highway, and pursuant to an order of the county court of the county in which the same is situated, obtained upon notice to such persons as the court may direct.

**Derivation.** This section is taken from former Highway Law, section 91.

**Laying out highways through cemeteries.** It is provided in section 10 of L. 1847, chap. 133, that so long as lands remain dedicated to the purposes of a cemetery, "no street, road, avenue or thoroughfare shall be laid out through such cemetery, or any part of the lands held by such association for the purposes aforesaid, without the consent of the trustees of such association, except by special permission of the legislature of the state."

The fact that lands have been previously devoted to cemetery purposes does not place them beyond the reach of condemnation for highway purposes. It is the necessary implication that but for express prohibition contained in statutes, cemetery lands would not be exempt from invasion; nor can it be



said that the taking of land for such purposes is unreasonable, unnatural, impolitic or unjust. Matter of Board of Street Opening, 133 N. Y. 329 (1892).

§ 202. **Costs; by whom paid.**—In all cases of assessments of damages by commissioners appointed by the county court, the costs thereof shall be paid by the town thereof, except that when reassessment of damages shall be had on the application of the party for whom the damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment; and when application shall be made by two or more persons for the reassessment of damages, all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to the first assessment, and may be recovered by action in favor of any person entitled to the same. Each commissioner appointed by the court, for each day necessarily employed as such, shall be entitled to four dollars and his necessary expenses.

**Derivation.** This section is taken from former Highway Law, section 92, as amended by L. 1907, chap. 50.

**What are costs.** The words costs thereof, as used in this section, do not and cannot by any fair construction be deemed to apply to a bill for legal services rendered by an attorney employed by the town superintendent, and it cannot be maintained that the Legislature intended by the word "costs" to embrace claims for attorney's fees for which the town superintendent is responsible. The costs referred to are those which may be allowed to one of the parties under section 240, *post*, and probably it should be deemed to apply to the fees and expenses of the commissioners therein provided for. The word costs does not apply to a personal debt incurred by the town superintendent. People *ex rel.* Bevins v. Supervisors, 82 Hun, 298, 31 N. Y. Supp. 248 (1894).

**Payment of costs.** The provision of this section requiring costs to be paid by the town applies only where the proposed improvement is carried into effect; where the proceeding is declared void, an owner who had obtained damages for land proposed to be taken, cannot recover from the town costs incurred by him in the proceeding. Matter of David, 44 Misc. 192, 89 N. Y. Supp. 812 (1904).

The town is not responsible for the fees of the commissioners except in the case where there is a valid assessment of damages and there is no responsibility in a case where the proposed improvement fails. So held where a proceeding instituted by a private individual for the laying out of a highway fails because an owner has not consented that the highway be laid out through a brick-yard, and the town superintendent does not certify that the public interests would be promoted by the opening of the highway, although the commissioners appointed by the court report in favor of the highway; and it is improper for the County Court in such a case to impose

upon the town the payment of the fees of the commissioners. It seems that the fees of the commissioners and the cost of the proceeding stands under the statutes on the same footing. *Matter of Miller*, 9 App. Div. 260, 41 N. Y. Supp. 581 (1896).

**Amount of costs.** A proceeding under the Highway Law to lay out a highway is a special proceeding within the meaning of section 3334 of the Code of Civil Procedure and the costs and disbursements are to be allowed at the rate prescribed in section 3240 of the Code, which provides that the costs in a special proceeding may be awarded at rates allowed for similar services in an action. *Matter of Peterson*, 94 App. Div. 143, 87 N. Y. Supp. 1014 (1904).

**§ 203. Damages assessed, and costs to be audited.**--- All damages to be agreed upon, or which may be finally assessed, and costs against the town, as herein provided, shall be laid before the board of town auditors, or in towns not having a board of town auditors, before the town board, to be audited with the charges of the commissioners, justices, surveyors or other persons or officers employed in making the assessment, and for whose services the town shall be liable, and the amount shall be placed upon the town abstract and levied and collected in the town in which the highway is situated, and the money so collected shall be paid to the supervisor of such town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges aforesaid.

**Derivation.** This section is taken from former Highway Law, section 93, as amended by L. 1898, chap. 106, without change.

**Amount of costs** on motion to confirm, modify or vacate decision of commissioners, to be audited by the town board, is prescribed by section 240, *post*.

**"Charges of the commissioners"** as used in this section are not to be construed to include the fees of an attorney employed by a petitioner. *Eppig v. City of New York*, 57 App. Div. 114, 68 N. Y. Supp. 41 (1901). As to meaning of word "costs" see *Matter of Peterson*, 94 App. Div. 143, 87 N. Y. Supp. 1014 (1904).

**Audit of damages.** Where there is in fact no assessment of damages the supervisors have no duty to perform in relation to the alleged claim of the relator. *People ex rel. Bevins v. Supervisors*, 82 Hun. 298, 31 N. Y. Supp. 248 (1894). For audit of damages upon a reassessment see *Clark v. Miller*, 42 Barb. 255, 266 (1864).

Where the supervisors have considered the bill and acted upon it their action was judicial. If they err the proper way to correct the error is by certiorari and not by mandamus. *People ex rel. Bevins v. Supervisors*, 82 Hun, 298, 31 N. Y. Supp. 248 (1894). A claim presented to the board of supervisors, who permit their session to expire without taking any action upon it, is to be regarded as rejected for the purpose of a mandamus to compel its allowance. *People ex rel. Aspinwall v. Supervisors of Richmond Co.*, 20 N. Y. 252 (1859).

**§ 204. When officers of different towns disagree about highway.**

— When the town superintendent of any town or officers of any village or city having the powers of town superintendents shall differ with the town superintendent or superintendents of any other town or with the officers of such a village or city having the powers of town superintendents in the same county, relating to the laying out of a new highway or altering an old highway, extending into both towns, or a town and a village or city, or upon the boundary line between such towns or such town and a village or city, or when a town superintendent of a town in one county shall differ with the town superintendent of a town or the officers of a village or city having the powers of town superintendents in another county, relating to the laying out of a new highway, or the altering of an old highway, which shall extend into both counties, or be upon the boundary line between such counties, the town superintendents of both towns or the officers of the village or city having such powers shall meet on five days' written notice, specifying the time and place, within some one of such towns, villages or cities, given by either of such town superintendents, or officers having powers of town superintendents, to make their determination in writing, upon the subject of their differences. If they cannot agree, they or either of them may certify the fact of their disagreement to the county court of that county, if the proposed highway is all in one county, or if in different counties, or if the county judge is disqualified or unable to act, to the supreme court; such court shall thereupon appoint three commissioners, freeholders of the county, not residents of the same town, village or city, where the highway is located; or if between two counties, then freeholders of another county, who shall take the constitutional oath of office, and upon due notice to all persons interested view the proposed highway, or proposed alteration of a highway, administer all necessary oaths, and take such evidence as they deem proper, and shall decide all questions that shall arise on the hearing, as to the laying out or altering of such highway, its location, width, grade and character of roadbed, or any point that may arise relating thereto; and if they decide to open or alter any highway, they shall ascertain and appraise the damages, if any, to the individual owners and occupants of the land through which such new or altered highway is proposed to pass, and shall report such evidence and decision to such court, with their assessment of damages, if any, with all convenient speed. On the coming in of such report, the court may,

by order, confirm, modify or set aside the report in whole or in part and may order a new appraisal by the same or by other commissioners, and shall decide all questions that may arise before it. And all orders and decisions in the matter shall be filed in the county clerk's office of each county where the highway is located, and shall be duly recorded therein. This section shall not be so construed as to compel any town or towns to construct, repair or maintain a bridge upon a boundary between towns, where previous to May seventh, nineteen hundred and three, an application had been made to any court, to compel the construction, repair and maintenance of a bridge upon such a boundary line, and such application had been denied.

**Derivation.** This section is taken from former Highway Law, section 94, as amended by L. 1903, chap. 460, without change.

This section applies where town superintendents fail to agree in the laying out of a road on the town line between two towns and not extending longitudinally into either. People *ex rel.* Titsworth v. Nash, 38 N. Y. St. Rep. 730, 15 N. Y. Supp. 29 (1891).

**Appointment of commissioners to determine differences.** Where two or more towns are interested in the laying out or altering of a highway, which extends into both towns or is upon the boundary line between such towns, the town superintendents are required to meet, upon five days written notice given by either one or the other of such town superintendents at a time and place specified in such notice. The intention of the statute is to require a meeting of the town superintendents and a certificate of their disagreement, as a condition precedent to the exercise of jurisdiction by the Supreme Court in the appointment of commissioners to settle the differences between the towns. Matter of Barrett, 7 App. Div. 482, 40 N. Y. Supp. 266 (1896).

The certificate must be formally executed and be sufficient to show the court the fact of their disagreement. The notice of meeting and certificate of the town superintendent may be in the following form.

#### FORM No. 74.

##### Notice of Meeting of Superintendents of Two or More Towns.

To J. D. and S. F.:

Please take notice that the undersigned town superintendent of highways for the town of \_\_\_\_\_ will meet you at \_\_\_\_\_, in said town on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, for the purpose of determining upon, and arriving at a common understanding in relation to the laying out [or altering] of a highway extending from the town [or city or village] of \_\_\_\_\_ to the town [or city or village] of \_\_\_\_\_ [or upon the boundary line between the town of \_\_\_\_\_ and the town of \_\_\_\_\_] described as follows: [Insert description of proposed highway or alteration of highway.]

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of town superintendent of highways.]

FORM No. 75.

Certificate of Town Superintendent.

COUNTY COURT, COUNTY OF .

In the Matter

of

The application of                    to lay out [or alter]  
 a highway extending into [or upon the boundary  
 line between] the town [or city or village] of  
 and the town [or city or village] of

To the County Court of                    county.

The undersigned, town superintendent of highways of the town of                    , in the county of                    , hereby certifies that he is unable to agree with the town superintendent of highways of the town of                    as to the laying out [or altering] of a highway extending from the town [or city or village] of                    , in the county of                    , to the town [or city or village] of                    , in the county of                    [or on the boundary line between the town of                    , in the county of                    ] and the town [or city or village] of                    , in the county of                    ; that the town superintendents of highways of said towns have duly met to determine upon their differences at                    , in the town of                    , on the                    day of                    , 19                    , and that they have failed to agree in the following particulars: [State in what particulars the town superintendents do not agree.]

Wherefore they respectfully request that three commissioners be appointed, as provided in section 204 of the Highway Law, to decide all questions that shall arise on the hearing before them as to the laying out [or altering] of such highway, its location, the width, grade and character of roadbed, or any other point that may arise relating thereto, and if they decide to open [or alter] such highway, to return and appraise the damages, if any, to the individual owners or occupants of the land through which such new [or altered] highway is proposed to pass and to report the evidence taken by them and their decision thereon, with their assessment of damages, if any, to this court, with all convenient speed.

Dated this                    day of                    , 19                    .

[Signature of town superintendent of highways.]

**Proceedings before commissioners.** Upon the presenting of the certificate the County Court, or the Supreme Court in case a county judge is disqualified or unable to act, must appoint commissioners. Such commissioners are required to qualify by taking the constitutional oath of office, to view the proposed highway, administer oaths and take such evidence as they deem proper, and determine the questions arising on the hearing, relating to the laying out or altering of such highway. The decision of the commissioners is subject to review by the court which appointed them and may be either confirmed, modified or set aside. The following forms of the order appointing commissioners and of the decision of the commissioner may be found useful:

## FORM No. 76.

**Order Appointing Commissioners in Cases of Differences Between Town Superintendents.**

At a \_\_\_\_\_ term of the County Court of the county of \_\_\_\_\_, held at \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

Present: Hon. E. E., County Judge.

[Title as in Form No. 75.]

On reading and filing the certificates of \_\_\_\_\_, town superintendent of highways of the town of \_\_\_\_\_, and \_\_\_\_\_, town superintendent [or other officials of city or village having powers of town superintendents] in the county of \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, stating [specify substance of facts in certificate] and upon reading the affidavits of \_\_\_\_\_ [specify other papers read] and after hearing \_\_\_\_\_ of counsel for the applicant, and \_\_\_\_\_, of counsel for \_\_\_\_\_, in opposition thereto, it is hereby

*Ordered*, that \_\_\_\_\_ [names and residences of the commissioners] be, and they are hereby appointed commissioners to determine upon the necessity of laying out [or altering] the highway described in such certificate and to adjust the terms upon which such highway shall be laid out [or altered] and to appraise the damages, if any, to the individual owners and occupants of the land through which such highway is laid out [or altered] and decide all questions that shall arise on the hearing, and take such other action and perform such duties as are prescribed in section 204 of the Highway Law, and to report the evidence taken before them and their decision, with their assessment of damages, if any, to this court with all convenient speed.

[Signature of county judge.]

## FORM No. 77.

**Decision of Commissioners as to Laying Out Highway.**

[Title as in Form No. 75.]

*Whereas* the undersigned having been duly appointed by an order of the County Court of \_\_\_\_\_ county, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, commissioners to decide as to the necessity of laying out [or altering] a highway extending into [or on the boundary line between] the town of \_\_\_\_\_, county of \_\_\_\_\_, and the town [city or village] of \_\_\_\_\_, county of \_\_\_\_\_, and described as follows [insert description of highway to be laid out or altered] and to adjust the terms upon which such highway shall be laid out [or altered] and to decide the questions pertaining to such laying out or altering, as provided in section 204 of the Highway Law, and

*Whereas* the said commissioners have given due notice of the time and place at which they would meet, and all have met at \_\_\_\_\_, in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, pursuant to such notice, and have taken the constitutional oath of office and, on proof of the service of due notice to the persons interested in the proceedings, have viewed the proposed highway [or proposed alteration of a highway] and the lands through which it is proposed to be laid out [or altered] and have heard all

the allegations of the town superintendents of highways [and other officers] and the parties interested therein and have taken the evidence of all the witnesses produced which they deemed proper, and have heard the arguments of counsel both for and against the proposed highway [or proposed alteration of the highway]; now therefore they, the said commissioners, do hereby

*Certify and report* that in their opinion it is necessary and proper that the said highway be laid out [or altered] as follows: [insert description of highway, or alteration] that such highway should be                  rods in width and that the roadbed thereof should be constructed [state character of roadbed].

That they have ascertained and do hereby appraise the damage to the individual owners or occupants of land through which such highway will pass, by reason of the laying out and opening [or altering] as follows:

The damages of M. N. at \$                  ; the damages of M. O. at \$                  , etc.  
Dated this                  day of                  , 19                  .

[Signatures of commissioners.]

The provisions of sections 194-203, relative to the laying out, altering or discontinuing of highways generally should be referred to and are applicable to proceedings under this section, except so far as they are inconsistent therewith. Many of the notes and cases cited under those sections will be found applicable in proceedings under this section.

**Papers to be filed.** All applications, orders, certificates and other papers relating to proceedings taken under this section are required to be filed by the town superintendent in the office of the town clerk of each town. See Highway Law, § 239, *post*.

**§ 205. Difference about improvements.**—When the town superintendent or the officers of a village or city having the powers of town superintendents therein, shall desire to make a new or altered highway extending beyond the bounds of such town, village or city, a better highway than is usually made for a common highway, with a special grade or roadbed, drainage or improved plan, and are willing to bear the whole or a part of the expense thereof beyond such bounds, but cannot agree in regard to the same, upon written application of either of the superintendents or officers, and notice to all parties interested, such court shall make an equitable adjustment of the matters, and may direct that in consideration of the payment of such portion of the additional expense by the town, village or city that desires the improved and better highway, as shall be equitable, its officers, contractors, servants and agents may go into such town, village or city, and make the grade and roadbed, and do whatever may be necessary and proper for the completion of such better highway, advancing the money to do it; the amount of damages to each owner or occupant shall be ascertained

and determined by commissioners, who shall be appointed, and whose proceedings shall be conducted in the manner provided by the last preceding section; and upon the coming in of their report of damages, and of the expenses paid, such court shall, on notice to all parties interested, direct that the amount of damages assessed each owner or occupant, if any, and all such expenses be paid by each, any or all of such towns, villages or cities as shall be just and equitable, and the damages and expenses assessed and allowed, as in this and the last preceding sections, shall be paid and collected as if fixed by the town superintendents of the towns, or the officers of such villages or cities having the powers of such superintendents. Every commissioner appointed as herein provided shall be paid six dollars for each day actually and necessarily employed in such service and necessary expenses.

**Derivation.** This section is taken from former Highway Law, § 95, without change.

The notes and cases cited under the preceding section should be referred to. The proceedings under this section are to be taken and conducted as provided in the preceding section.

§ 206. **Highway in two or more towns.**— When application is made to lay out, alter or discontinue a highway located in two or more towns, all notices or proceedings required to be served upon the town superintendents shall be served upon the town superintendent of each town; and the commissioners appointed by the court shall determine the amount of damages to be paid by each town, and when the towns are in different counties, the application for the appointment of commissioners shall be made to a special term of the supreme court held in the district where the highway or some part of it is located; and the same proceedings shall thereafter be had in the supreme court of such district as are authorized by this chapter to be had in the county court.

**Derivation.** This section is taken from former Highway Law, § 96, without change.

**Application of section.** This section should be construed in connection with the provisions of section 204. It is intended as a supplement to the former section and was enacted for the purpose of carrying out in detail the requirements thereof. *Matter of Barrett*, 7 App. Div. 482, 40 N. Y. Supp. 266 (1896).

The person liable to be assessed in one town may institute proceedings to lay out a highway which is located partly in his own town and partly in another town, and where he has complied with all the statutory require-



ments, and the towns are in the same county, the County Court is authorized to appoint commissioners in the matter. *People ex rel. Knapp v. Keck*, 90 Hun, 497, 36 N. Y. Supp. 51 (1895).

Proceedings before a special term of the Supreme Court where the highways lie in more than one county are to be governed by section 193, *ante*, and the immediately following sections, as though the highway were entirely within one county and the proceedings were had before the County Court. *Matter of Taylor*, 8 App. Div. 395, 40 N. Y. Supp. 839 (1896).

§ 207. **Laying out, dividing and maintaining highway upon town line.**—An application to lay out a highway upon the line between two or more towns shall be made to the town superintendents of each town, who shall act together in the matter; and, upon laying out any such highway, the expense of opening, working and keeping the same in repair shall be borne equally by such towns. The town superintendents shall cause a map and survey of the highway to be recorded in the office of the town clerk in each of the respective towns. If such highway be upon a line between one or more towns and a city or incorporated village, such application shall also be made to the officers of such city or village having the powers of the town superintendents and such officers may agree with the town superintendents of such towns as to division of such expense. Whenever such officers shall disagree, the question shall be submitted to the district or county superintendent or superintendents representing the county or counties, district or districts in which such highway is located and their decision shall be final when approved by the state commission. All highways heretofore laid out upon the line between any two towns or between a town and a city or an incorporated village shall be divided and allotted or redivided and reallocated, recorded and kept in repair in the manner above directed; and all bridges upon such highways shall be built and maintained jointly by the towns whether wholly located within one of them or otherwise.

**Derivation.** This section is taken from former Highway Law, § 97, with such changes as were thought necessary because of the change in the system of working the highways.

The object of this section is to provide for the disposition of an application to lay out and open a highway upon a boundary line between towns, or between a town and a city or village. In such a case the application required by section 192 is to be made to the town superintendents of each town, and the consents, releases and dedications are to be made to each. The required orders and certificates laying out such highways are to be executed jointly by the town superintendents of both towns. All papers used in the

proceedings should be executed in duplicate and one set filed in the office of the town clerk of each town.

**Submission of question to district or county superintendent.** Under the former law if there was a disagreement between the officers whose duty it was to lay out a highway upon a line between towns, or between a town and a city or village, the question was to be determined by commissioners appointed as in the case of the laying out of any other highway. Under the present law the differences are to be settled by the county or district superintendent within whose county or district the proposed highway is situated. The decision of the district or county superintendent is final when approved by the commission. This procedure will be much less expensive and will probably accomplish as good a result.

The proceedings outlined in section 204 are applicable to the rights designated in this section. *People ex rel. Titsworth v. Nash*, 38 N. Y. St. Rep. 730, 15 N. Y. Supp. 29 (1891). It seems that in the absence of any provision of the statute for review in such a case, the determination of the joint board of town superintendents may be considered final and cannot be reviewed on appeal. *People ex rel. Clarkson v. Nelson*, 26 How. Pr. 346 (1863).

**Allotment of highway.** The portion of the highway allotted is to be considered as belonging wholly to the town to which it shall be allotted; and the town superintendent of the town to which the allotment is made can only maintain an action for an encroachment upon that portion of the highway. *Bradley v. Blair*, 17 Barb. 480 (1854). The fact that the partition and allotment of the part of the highway assigned to one town was not recorded in the office of the town clerk in each of the towns, will not render the other town liable for injuries caused by a defect of the highway in that portion allotted to the first town. *Jones v. City of Utica*, 16 Hun, 441 (1879).

The provision for the opening, improving and keeping in repair by one town of the part of the highway allotted to it does not compel such town to stand the expense of building and maintaining bridges; and a bridge upon such a highway is to be maintained at the joint expense of both towns. *Day v. Day*, 94 N. Y. 153 (1883); *Bartlett v. Crozier*, 17 Johns. 439 (1820). But see *Tift v. Alley*, 3 T. & C. 784 (1874).

**§ 208. Final determination, how carried out.**—The final determination of commissioners appointed by any court, relating to laying out, altering or discontinuing a highway, and all orders and other papers filed or entered in the proceedings, or certified copies thereof from the court where such determination, order and papers are filed and entered, shall be forthwith filed and recorded in the town clerk's office of the town where the highway is located; and every such decision shall be carried out by the town superintendent of the town, the same as if they had made an order to that effect.

**Derivation.** This section is taken from former Highway Law, section 98, without change.

**Duty of town superintendent upon final determination.** When commissioners appointed as provided in this article have decided that a highway should

be laid out, altered or discontinued it becomes the duty of the town superintendent to carry into effect such determination. *People ex rel. D., L. & W. R. R. Co. v. County Court*, 92 Hun, 13, 37 N. Y. Supp. 869 (1895).

The duty of the town superintendent to carry into effect the decision of the commissioners is a positive one. He can exercise no discretion in the matter. If he refuses to act mandamus will lie to compel him to make an order laying out, altering or discontinuing the highway as directed in the decision. *People v. Champion*, 16 Johns. 61 (1819). But where it appears that the proceedings were void because of jurisdictional defects mandamus will not lie. *People ex rel. Johnson v. Whitney's Point*, 32 Hun, 508 (1884); *Miller v. Brown*, 56 N. Y. 383 (1874); *People ex rel. Smith v. Allen*, 37 App. Div. 248, 55 N. Y. Supp. 1057 (1899). Nor will it lie where it appears that the public will derive no benefit from the opening of the highway. *People ex rel. Ashley v. Commissioners of Highways*, 42 Hun, 463 (1886). And it has been held that the fact that the damages have not been released or assessed was a good defense. *People ex rel. Clark v. Comm's of Highways*, 1 Thomp. & C. 193 (1873).

**Construction of highway.** A town superintendent is not authorized by this section to pave and macadamize a newly opened highway. A contract for such a purpose is void and cannot be ratified by the town board. *Matter of Niland*, 113 App. Div. 661, 99 N. Y. Supp. 914 (1906).

§ 209. **Highways by use.**—All lands which shall have been used by the public as a highway for the period of twenty years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least two rods.

**Derivation.** This section is taken from former Highway Law, section 100, without change in substance.

**Survey of highway.** Where a highway has been used for the period of twenty years, as provided in this section, the town superintendent should notify the district or county superintendent, whose duty it is to make or cause to be made a survey of the highway, and the town superintendent must include such survey in an order to be signed by him and filed in the office of the town clerk. Upon the entry of such order the highway becomes open to the public as a matter of record and it is then the duty of the town superintendent to maintain it in the same manner as other town highways.

**Object of section.** This section declares the common law rule as to the implied dedication of land as a public highway by an uninterrupted use thereof by the public with the knowledge, but without the consent of the owner for a period of twenty years. The period of twenty years is probably laid down as analogous to the period of limitation applicable to incorporeal rights in real property as between persons. *James v. Sammis*, 132 N. Y. 239 (1892). The presumption of a grant of a public right of way springs from the mere lapse of the period of twenty years in connection with the adverse user by the public. *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892).

Public use for twenty years is proof of the existence of a highway. *Chapman v. Swan*, 65 Barb. 210 (1865); *Miller v. Garlock*, 8 Barb. 153 (1850). User for twenty years will make a road a highway with or without dedication. *Town of Corning v. Head*, 86 Hun, 12, 33 N. Y. Supp. 360 (1895); *Wiggins v. Tallmadge*, 11 Barb. 457 (1851); *Chapman v. Swan*, 65 Barb. 210 (1865). If mere user by the public without any action of the town authorities in laying out or recording, or improving or accepting the road, can make a highway, such user must continue at least twenty years. *Matter of Skawangunk Kill Bridge*, 100 N. Y. 642 (1885). User alone is sufficient to establish a dedication; but if there be no other evidence of the fact, it must have continued twenty years. *Gould v. Glass*, 19 Barb. 179 (1855).

It is a question of fact for the jury to say whether a way has become by long continued use a public highway, or whether there has been any dedication by the owner and acceptance thereof by the public. *Porter v. Village of Attica*, 33 Hun, 605 (1884); *McCarthy v. L. L. S. & M. S. R. Co.*, 76 N. Y. 592 (1879); *Kelsey v. Burgess*, 12 N. Y. Supp. 169, 35 N. Y. St. Rep. 368 (1890). Where successive owners of land have permitted the public to use the same as a public highway for twenty years or more, without interruption or objection, an intention is immaterial and it is no matter that the owner be a lunatic, infant or married woman. *Devenpeck v. Lambert*, 44 Barb. 596 (1865); *People ex rel. Rensselaer v. Van Alstyne*, 3 Abb. Ct. App. Dec. 575 (1866). For history of statutes declaring highways by user, see *James v. Sammis*, 132 N. Y. 239 (1892).

**Acceptance need not be proved.** When the fact of twenty years of such user is found the importance of the question of dedication and acceptance substantially disappears. The statute then declares that it is a public highway. *Porter v. Village of Attica*, 33 Hun, 605 (1884); *Devenpeck v. Lambert*, 44 Barb. 596 (1865). A highway dedicated by the owner of the land but not accepted by the authorities, does not become a public highway unless used by the public as such for the full period of twenty years. *Trustees of Jordan v. Otis*, 37 Barb. 50 (1862); *Rozell v. Andrews*, 103 N. Y. 150 (1886). But proof of acceptance by the public is unimportant. It is the user itself which controls and constitutes an acceptance. *Porter v. Village of Attica*, 33 Hun, 605 (1884); *Vandemark v. Porter* 40 Hun, 397 (1886). A user by the public for more than twenty years constitutes an acceptance and establishes a highway. *Vandemark v. Porter*, 40 Hun, 397 (1886); *Wiggins v. Tallmadge*, 11 Barb. 457 (1851).

**Character and extent of use.** Both at common law and under our statute before lands can become a public highway by prescription they must have been used by the general public as a highway, under claim of right, without interruption or substantial change for at least twenty years, and must have been kept in repair, taken in charge of and adopted by the public authorities, so that the town has become responsible for their condition, and for injuries to travelers resulting through the negligence of the highway officers and so that persons obstructing the same may be subject to a fine under the statute. *Riley v. Brodie*, 22 Misc. 374, 278, 50 N. Y. Supp. 347 (1898). The use must be like that of highways generally. *Spier v. Town of New Utrecht*, 121 N. Y. 420 (1890). Where the premises in dispute have been dedicated as a highway and used as such by the public for more than twenty years, and have

been accepted and worked by the authorities as a highway they become a legal highway. *Town of Corning v. Head*, 86 Hun, 12, 33 N. Y. Supp. 360 (1895); *Spier v. Town of New Utrecht*, 121 N. Y. 420, 431 (1890); *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892); *Gidney v. Earl*, 12 Wend. 98 (1834).

The words "used by the public as a highway" contained in this section are of the same purport as the phraseology "used as public highways," contained in the corresponding section of the Revised Statutes. *Cunningham v. Osborn*, 84 Hun, 441, 32 N. Y. Supp. 358 (1895).

It is laid down as an elementary principal that where a road originally passes through woodland mere use is insufficient to constitute it a public road. The ground for the distinction is that where the land is inclosed and cultivated the mere use is an invasion and a trespass, but where it is woodland those who travel it subject the owner to no loss or inconvenience and commit no trespass until after notice to desist. To prohibit such use would be considered churlish and would be ineffective unless constant watch were kept. *Harriman v. Howe*, 78 Hun, 280, 28 N. Y. Supp. 858 (1894).

The existence of a railroad upon the highway during a portion of the twenty years does not defeat the claim of a highway by user, if it still remains a road and is used for public travel. If the user is otherwise sufficient to constitute the road a highway, the presence of the railroad tracks is an immaterial circumstance. *Spier v. Town of New Utrecht*, 121 N. Y. 420, 431 (1890). Where a highway has become a public highway by user it does not cease to be such even though it originally was let to a dock and ferry and the ferry has since been changed and though part of the highway has been appropriated and built upon, provided the passage continues open to the same dock and landing. *Galatian v. Gardner*, 7 Johns. 106 (1810).

The use of land as a private road for a period of twenty years does not bring such road within the statutory provision that lands which have been used by the public as a highway for twenty years shall be a highway. *Culver v. City of Yonkers*, 80 App. Div. 309, 80 N. Y. Supp. 1034 (1903), affirmed, 180 N. Y. 524.

User alone of a road is insufficient to show it to be a public highway; such use must be associated with some act showing such use to be claimed as a right hostile and independent of the will of the owner, such as reparation or the assumption of control of the road in some ostensible manner; a private way open to the owners of land through which it passed for their own use does not become a public highway merely because the public are permitted for many years to travel over it. *People ex rel. Cunningham v. Osborn*, 84 Hun, 441, 32 N. Y. Supp. 358 (1895); *Spear v. The Town of New Utrecht*, 121 N. Y. 420 (1890); *Palmer v. Palmer*, 150 N. Y. 139 (1896); *Harriman v. Howe*, 78 Hun, 280, 28 N. Y. Supp. 858 (1894). The fact that the road has been recorded as a private road will prevent its becoming a public highway by prescription. *Devenpeck v. Lambert*, 44 Barb. 596 (1865); *In re Howland Bridge*, 14 N. Y. Supp. 845 (1891); *Matter of Freeholders of Montezuma*, 38 N. Y. St. Rep. 970, 14 N. Y. Supp. 845 (1891).

**Right of public.** The easement of the public in a highway by use only extends to the way which has been acquired by public use for the prescribed period. The town superintendent can only determine questions as to the boundary of the highway according to its actual use for such period. If a way

be established by prescription or user the public use defines the extent of the easement. *Walker v. Caywood*, 31 N. Y. 51 (1865).

An order of the town superintendent describing a road which has been used as a highway for more than twenty years will not have the effect to change the width or location of the highway; such order is effective only as a description of the way as manifested by the permitted twenty years' use. *Ivory v. Town of Deerpark*, 116 N. Y. 476 (1889); *Kerr v. Hammer*, 39 N. Y. St. Rep. 708, 15 N. Y. Supp. 605 (1891); *People ex rel. Commissioners of Highways v. The County Judges*, 24 Wend. 491 (1840). Nor has the town superintendent power to remove obstructions or encroachments upon that part of the highway which extends beyond the actual user; the existence of the highway must be based upon the extent of the user. *Alpaugh v. Bennett*, 59 Hun, 45, 12 N. Y. Supp. 398 (1891); *Talmage v. Hunting*, 29 N. Y. 447 (1864).

A highway laid out by user need not necessarily be of the statutory width; the exact bounds of such a highway is a question of fact for the jury. *Harlow v. Humiston*, 6 Cow. 189 (1826). As to duty of town superintendent to open the road to a width of two rods, see *Snyder v. Trumbour*, 38 N. Y. 355 (1868); *Snyder v. Plass*, 28 N. Y. 465 (1864); *Alpaugh v. Bennett*, 59 Hun, 45, 12 N. Y. Supp. 398 (1891); *Devenpeck v. Lambert* 44 Barb. 596 (1865).

A highway which has become such by user may not be obstructed even though the town superintendent failed to have it opened to a width of two rods and duly recorded with the town clerk. *Devenpeck v. Lambert*, 44 Barb. 596 (1865). An action to recover a penalty for encroaching upon public highway will lie as well in the case of a highway by prescription as for one laid out by proceedings under the statute or one established by dedication. *Town of West Union v. Richey*, 64 App. Div. 156, 71 N. Y. Supp. 871 (1901).

The record of the highway by the town superintendent is not conclusive on the point that the road is a public highway. *Cole v. Van Keuren*, 6 T. & C. 480 (1875); *Kelsey v. Burgess*, 12 N. Y. Supp. 169, 35 N. Y. St. Rep. 368 (1890). Where there has been such user of a road by the public for twenty years, as would justify a record of it as a public highway, and it has either been kept in repair or taken in charge by the authorities, the fact that they have failed to perform their duty to record it, does not change the mandate of the statute that it shall be a public highway. *Lewis v. N. Y., L. E. & W. R. R. Co.*, 123 N. Y. 496 (1890). Such a road is a highway if in fact it has been used for twenty years, independent of any judgment of the town superintendent. *Snyder v. Plass*, 28 N. Y. 465 (1864).

Where a highway had not been used as a public highway for twenty years its use as such is not sufficiently ancient to supersede the necessity of its being recorded. *People v. Lawson*, 17 Johns. 277 (1820).

§ 210. Fences to be removed.—Whenever a highway shall have been laid out through any inclosed, cultivated or improved lands, in conformity to the provisions of this chapter, the town superintendent shall give to the owner or occupant of the land through which such highway shall have been laid, sixty days' notice in writing to remove his fences; if such owner shall not

remove his fences within sixty days; the town superintendent shall cause them to be removed, and shall direct the highway to be opened and worked.

**Derivation.** This section is taken from former Highway Law, section 101, without change.

**Fences as obstructions.** Fences erected within the bounds of a highway constitute obstructions, and it is the duty of the owner or occupant of the abutting lands to remove them. Highway Law, § 52, *ante*, p. 66. If the owner or occupant does not remove them, the town superintendent must do so, and the expense incurred may be assessed against such owner or occupant. *Idem*, § 55, *ante*, p. 76.

This section does not abrogate the common-law remedy of abatement of nuisance or abolish the proceeding by indictment. The remedy given is cumulative. *Wetmore v. Tracey*, 14 Wend. 250 (1835).

**Necessity of notice.** It is intended that notice to remove fences be given in all cases of highways laid out through inclosed lands, whether laid out directly or indirectly by the town superintendent. *Case v. Thompson*, 6 Wend. 634 (1831). If there is an appeal from the order of the town superintendent, the notice cannot be given until it is determined; and pending the appeal the fence does not become a public nuisance. *Drake v. Rogers*, 3 Hill, 604 (1842); *Case v. Thompson*, 6 Wend. 634 (1831).

In an action for obstructing a highway the defendant, over whose land the way passes, may show failure to notify him to remove his fences, in proof that the alleged highway does not legally exist. *Cooper v. Bean*, 5 Lans. 318 (1871). If the town superintendent has no right to open a road without giving notice to the party to remove his fences, then he is bound to prove that such notice has been given in order to entitle himself to the protection afforded by the section. It is not incumbent on the owner of the land to prove that such notice had not been given. *Case v. Thompson*, 6 Wend. 634 (1831).

The notice to remove fences may be in the following form:

**FORM No. 78.**

**Notice to Remove Fences.**

To Thomas Wood:

Please take notice that I, the undersigned, town superintendent of highways of the town of \_\_\_\_\_, county of \_\_\_\_\_, having by an order [or certificate] duly made and filed in the office of the town clerk of such town, bearing date the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, laid out and opened a public highway through your inclosed lands, do hereby require you to remove your fences from within the bounds of said highway, within sixty days after the service upon you of this notice.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

[Signature of town superintendent].

§ 211. **Private road.**—An application for a private road shall be made in writing to the town superintendent of the town in which it is to be located, specifying its width and location, courses

and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

**Derivation.** This section is taken from former Highway Law, section 106, without change.

**Constitutional provision.** Section 7 of Article I of the Constitution provides that "private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited." This provision of the Constitution has been held not to apply to a way by necessity nor to a way used by the owner for his own convenience, and which crosses land afterwards subdivided and sold. *Wheeler v. Gilsey*, 35 How. Pr. 139 (1867). A taking of land for a private way is the taking of private property for private use, and is unlawful without express constitutional authority. *Taylor v. Porter*, 4 Hill, 140 (1843).

**Private ways in general.** A right of way is a privilege which one person, or a particular description of persons, may have of passing over the land of another person in a particular line. 3 Kent's Comm. 419. It is a right pertaining to the realty, constituting an easement in the land and is termed in law an incorporeal hereditament.

A private way may exist either; (1) by grant; (2) by prescription; (3) by necessity; and (4) by proceedings under the statute.

**Private way by grant.** A private way is created by grant where the owner of a piece of land grants to another the right of passing over it in a particular direction. In granting the way, the grantor may limit the right as he pleases and a right of way for one purpose does not necessarily include a right of way for another purpose. Wherever a grant is made for a specified purpose the grantor must offer reasonable facilities for the enjoyment of the way by the grantee in the manner specified. *Bakeman v. Talbot*, 31 N. Y. 366 (1865).

If a way is granted for a certain purpose whatever is necessary for that purpose is, by implication, granted also. *Lyman v. Arnold*, 5 Mason (U. S.) 195.

If a right of way is granted generally, without designation of the place where it is to be located, it may become fixed and determined as to location by usage for a reasonable length of time, and when so located it cannot be afterwards changed by the grantor. But if changed, the grantee, by usage of the newly designated way for a length of time will be deemed to have acquiesced in the change. *Wynkoop v. Burger*, 12 Johns. 222 (1815).

**Right of way by prescription.** Right of way may be acquired by prescription. It is so created by an uninterrupted enjoyment of a way for a period of twenty years with the knowledge and acquiescence of the owner. The enjoyment of a way for more than twenty years by license or permission of the owner confers no right by prescription. *Boyce v. Brown*, 7 Barb. 80 (1849). An uninterrupted use and enjoyment of a private right of way over the land of another for twenty years, becomes an adverse enjoyment sufficient to raise the presumption of a grant; but such use, to be conclusive evidence



of a right must have been continuous, uninterrupted and exclusive, and under a claim of right with the knowledge and acquiescence of the owner. Thereafter such right can be lost only by nonuser for twenty years or a release. *Miller v. Garlock*, 8 Barb. 153 (1850). A right of way acquired by prescription may be lost by nonuser; but it cannot be lost or extinguished by mere nonuser when it has been acquired by deed. Nothing short of a holding strictly adverse for twenty years could produce the latter result. *Smyles v. Hastings*, 22 N. Y. 217, 224 (1860).

Where the owner of a farm lying off the public highway uses openly, exclusively and continuously for a period of more than twenty years a road over the intervening land, there exists a presumption of an adverse user, and the burden is upon the owner of the land to show that the user had been by virtue of a license or presumption. *Hey v. Collman*, 78 App. Div. 584, 79 N. Y. Supp. 778, affirmed 180 N. Y. 560 (1903).

**Ways by necessity.** If a man sells land to another which is wholly surrounded by his own land, the purchaser is entitled to a right of way over the land of the vendor in coming to and from the lands purchased; this principle applies where the land conveyed is surrounded in part by the lands of the grantor and in part by the lands of a third person. *Palmer v. Palmer*, 150 N. Y. 139 (1896). The right of the purchaser to pass over the lands of the vendor arises only where its existence is essential to the enjoyment of the land conveyed and cannot rest on mere convenience. *Burlew v. Hunter*, 41 App. Div. 148, 58 N. Y. Supp. 453 (1899). See also *Wilmurt v. McGrane*, 16 App. Div. 413, 45 N. Y. Supp. 32 (1897). A right of way created by necessity continues no longer than the existence of the necessity which created it. See *N. Y. Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353 (1846).

**Private way by proceedings under the statute.** A private way may be acquired over the lands of another by proceedings instituted as provided in this article. If the main object of a proposed road is to furnish access to a private lot application should be made for a private road under this section and not for a public road under section 192.

**Application for private road.** The object of the description required by this section is obviously for the purpose of enabling the owner of the land, through which the road is to be laid out, to understand what portion of his lands is intended to be taken, and the jury intelligently to determine upon the necessity of the road and to assess the damages; and a substantial compliance, so as to accomplish these objects, is sufficient. *People ex rel. Smith v. Taylor*, 34 Barb. 481 (1860). A description by reference to a pre-existing private way by permission, well marked by user and known as a road, though never legally laid out, is sufficiently certain. The statute is substantially complied with when the application gives the general course by points of the compass only, without degrees and minutes, where the exact course and distance can be determined from other particulars in the application or by natural monuments referred to therein. *Satterly v. Winne*, 101 N. Y. 218 (1886); *People ex rel. Smith v. Taylor*, 34 Barb. 481 (1860).

An executor authorized to control and manage real estate is the proper party to continue proceedings commenced by the testator. *People ex rel. Keenholts v. Robinson*, 29 Barb. 77 (1858).

**Use of private road.** Unlike one passing along a public highway, the grantee of a private right of way, which has become impassable cannot, with-

out becoming a trespasser, go on the adjoining close to pass around the obstruction. The rule is the same though the obstruction be caused by the grantor of the right, the only remedy being to remove the obstruction and prosecute for damages. *Williams v. Safford* 7 Barb. 309 (1849). Where one person has a private right of way over the lands of another, the manner of its enjoyment being undefined, nothing passes as an incident to such grant but what is requisite to its fair enjoyment. The fee of the land still remains in the grantor of such a privilege and he may use such land as he pleases in a manner consistent with the grant. Facilities for passage are to be regulated by the nature of the case. And the grantee is bound to keep the private way in repair, nor may he deviate from it and go upon the lands of the grantor. *Bakeman v. Talbot*, 31 N. Y. 366 (1865).

The owner of land through which a private road passes must so build his fences as to leave full two rods in width in every part of the road; but the owner of the road will be deemed to have assented to such fences projecting into the road, if damages were assessed in reference to such location or if he permits fences to be so built without objection. *Herrick v. Stover*, 5 Wend. 580 (1830).

An obstruction placed in a private road by the owner of the land over which it is laid out, cannot be lawfully removed by one having no right to use the road. *Drake v. Rogers*, 3 Hill, 604 (1842). Penalties for obstructing roads apply only to public highways, and not to private roads. *Fowler v. Lansing*, 9 Johns. 349 (1812).

**Form of application.** The application to lay out a private road may be in the following form:

#### FORM No. 79.

##### Application for Private Road.

To the town superintendent of highway of the town of \_\_\_\_\_, county of \_\_\_\_\_

The undersigned, who is assessable for highway taxes in the town of \_\_\_\_\_, hereby makes application to you pursuant to section 211 of the Highway Law to lay out a private road for his use and benefit, which road is described as follows: 'Beginning [give description of road specifying width, location, courses and distances]; said proposed road will run through the lands of T. W. occupied by S. M.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

[Signature of applicant.]

**§ 212. Jury to determine necessity and assess damages.**—The town superintendent to whom the application shall be made shall appoint as early a day as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof.

**Derivation.** This section is taken from former Highway Law, § 107, without change.

**§ 213. Copy application and notice delivered to applicant.—**

Such town superintendent shall deliver to the applicant a copy of the application, to which shall be added a notice of the time and place appointed for the selection of the jury, addressed to the owners and occupants of the land.

**Derivation.** This section is taken from former Highway Law, § 108, without change.

The notice to be attached to the application and served upon the owner and occupant may be in the following form:

**FORM No. 80.**

**Notice to Owner or Occupant.**

To Thomas Wood, owner, and John Smith, occupant:

John Dorn, of the town of \_\_\_\_\_, county of \_\_\_\_\_, having made a written application to me, as town superintendent of highways of such town, to lay out a private road for his use and benefit, as provided in section 211 of the Highway Law, a copy of which application is hereto annexed, you are hereby notified that a jury will be selected at \_\_\_\_\_, in said town, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, for the purpose of determining upon the necessity of such road, and of assessing the damages by reason of the opening thereof.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of town superintendent of highways.]

**§ 214. Copy and notice to be served.—**The applicant on receiving the copy and notice shall, on the same day, or the next day thereafter, excluding Sunday and holidays, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who reside in the same town a copy thereof, or in case of his absence, by leaving the same at his residence and upon such as reside elsewhere, by depositing in the postoffice a copy thereof to each, properly enclosed in an envelope, addressed to them respectively at their postoffice address, and paying the postage thereon, or, in case of infant owners, by like service upon their parent or guardian.

**Derivation.** This section is taken from former Highway Law, § 109, without change.

**Necessity of notice.** The owners of land through which the private road is to be laid out are entitled to written notice of the time and place of the meeting of the jury to determine its necessity. But where an owner upon verbal notice merely appears and contests the matter before the jury, without making an objection on the ground of want of sufficient notice, he will be deemed to have waived the irregularity. *Mohawk and Hudson Co. v. Artcher*, 6 Paige, 83 (1836).

The affidavit of service of the copy of the application and the notice, when made personally, may be in the following form:

FORM No. 81.

Affidavit of Service of Notice.

STATE OF NEW YORK, }  
COUNTY OF } ss.:

John Dorn, being duly sworn, deposes and says that he served the application and notice hereto annexed on \_\_\_\_\_, the persons named in such notice, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by delivering to and leaving with each of them copies of the same [or, by leaving copies thereof at their residences in the town of \_\_\_\_\_].

JOHN DORN.

Subscribed and sworn to before me,  
this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of officer.]

§ 215. List of jurors.— At such time and place, on due proof of the service of the notice, the town superintendent shall present a list of the names of thirty-six resident freeholders of the town, in no wise of kin to the applicant, owner or occupant, or either of them, and not interested in such lands.

**Derivation.** This section is taken from former Highway Law, section 110, as amended by L. 1904, chap. 109, without change.

**Jury of freeholders.** It will be assumed that the jury is composed of reputable freeholders unless the contrary be shown. *Clark v. Phelps*, 4 Cow. 190 (1825). Although it does not expressly appear that the jurors were freeholders, and no objection was made on that ground and the parties agreed on the jury, it will be considered that they have the necessary requirements. People *ex rel. Smith v. Taylor*, 34 Barb. 481 (1860).

§ 216. Names struck off.— The owners or occupants of the land may strike from the list not more than twelve names, and the applicant a like number; and of the number which remains, the twelve names standing first on the list shall be the jury.

**Derivation.** This section is taken from former Highway Law, section 111, as amended by L. 1904, chap. 109, without change.

**Constitutionality.** The amendments of 1904 to section 111 of the former Highway Law increased the number of the jury from six to twelve. Prior to this amendment it had been held that a jury of six drawn in the manner prescribed by this section did not comply with the constitutional requirement that the necessity of the road and the damages should be determined by a jury of freeholders. *Berridge v. Shults*, 32 Misc. 444, 66 N. Y. Supp. 204 (1900). It was evidently thought that by increasing the number of the jury from six to twelve this constitutional objection might be obviated.

The case of *Berridge v. Shults* was decided upon the authority of *People ex rel. Eckerson v. Trustees*, 151 N. Y. 75 (1896). In that case the question was raised as to the constitutionality of a statute providing for the opening of a street under the former Village Law of 1870, which provided that a jury should consist of six jurors and should be formed of the names remaining on a list of twelve freeholders of the village after the owners of the lands to be taken had struck therefrom not more than six names. The court held that this was not such a jury as was contemplated by the constitution when it provided that the compensation to be paid for property taken for public use should be ascertained by a jury. The jury contemplated by the Constitution is one drawn in a manner to conform to the usual mode of drawing jurors. It may be doubted whether the Amendment of 1904 of the former Highway Law really cured the constitutional defects passed upon in the case of *Berridge v. Shults*. The method used in these sections in securing a jury is not that used in ordinary judicial proceedings. The town superintendent is authorized by section 215 to present the names of thirty-six resident freeholders of the town; he is not limited in his discretion as to what names shall go upon the list. Ordinarily a jury is drawn from a list of jurors publicly drawn by lot, in the most careful manner and under the supervision of not less than two public officers, with every reasonable precaution to select fair and impartial men, and no party to an action can directly or indirectly choose the jurors who are to serve at the session of court in which an action is to be tried. There is not the same degree of care used in the securing of a jury for the determination as to the necessity and the assessment of damages in the opening of a private road.

**§ 217. Place of meeting.**—The town superintendent shall then appoint some convenient time and place for the jury to meet, and shall summon them accordingly.

**Derivation.** This section is taken from former Highway Law, section 112, without change.

**Summoning jury.** The town superintendent must summon the jurors personally and may not delegate the duty to another. But where a jury, summoned by a constable, when assembled are requested by the town superintendent to act, the summoning is sufficient. *People ex rel. Elliott v. Commissioners of Greenbush*, 24 Wend. 367 (1840).

The following form may be used for the summons:

**FORM No. 82.**

**Summons of Jurors.**

To [insert names of twelve jurors]:

You are hereby summoned and required to appear at the \_\_\_\_\_, in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ o'clock in \_\_\_\_\_ noon, being the time and place appointed by me for you to meet, to form a jury of freeholders to determine as to the necessity of laying out a private road through the lands of Thomas Wood, on the application of John Dorn, and to assess the amount of damages sustained by reason of the opening of such road, if it be determined to open the same.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of town superintendent of highways.]

§ 218. **Jury to determine and assess damages.**—The town superintendent and all the persons named and summoned on such jury, shall meet at the time and place appointed; but if one or more of the twelve jurors shall not appear, the town superintendent shall summon so many qualified to serve as such jurors as will be sufficient to make the number present twelve to forthwith appear and act as such; and when twelve shall have so appeared, they shall constitute the jury and shall be sworn well and truly to determine as to the necessity of the road, and to assess the damages by reason of the opening thereof.

**Derivation.** This section is taken from former Highway Law, section 113, as amended by L. 1904, chap. 109, without change.

**Jury to be sworn.** The section requires each juror to be sworn to well and truly determine as to the necessity of the road, and to assess the damages. The oath may be in the following form:

**FORM No. 83.**

**Oath of Jurors.**

You do solemnly swear, in the presence of the ever-living God [or affirm] that you will well and truly determine as to the necessity of a private road across the lands of Thomas Wood, for the laying out and opening of which application has been made by John Doran, and that you will well and truly assess the damages occasioned by the opening of such road.

§ 219. **Their verdict.**—The jury shall view the premises, hear the allegations of the parties, and such witnesses as they may produce, and if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the town superintendent.

**Derivation.** This section is taken from former Highway Law, section 114, without change.

**Review of assessment.** In the case of a private road, the damages being paid by a private person and not by a levy and collection of a tax, the board of supervisors has no right to revise an assessment of damages by the jury. *Craig v. Supervisors of Orange*, 10 Wend. 585 (1833).

**Duty of town superintendent as to verdict.** If the jury find in favor of laying out the road, the town superintendent is bound to lay it out as described in the application, and has no discretion either to refuse to lay out the road, or to change its location. He has no power to decide anything but performs simply ministerial functions. *Satterly v. Winne*, 101 N. Y. 218 (1886); *People ex rel. Keenholts v. Robinson*, 29 Barb. 77 (1858).

Witnesses may be subpoenaed to appear before the jury and oaths may be administered to them by the town superintendent. Such oath may be in the following form:

**FORM No. 84.****Oath of Witnesses.**

You do solemnly swear [or affirm] that the evidence you shall give, touching the necessity of laying out the private road as applied for by John Dorn and the damages to be sustained thereby, shall be the truth, the whole truth, and nothing but the truth, so help you God.

The verdict must determine as to the necessity of the proposed private road and must decide as to the damages sustained by the person through whose lands the private road is laid out and opened. It may be in the following form:

**FORM No. 85.****Verdict of Private Road Jury.**

We, the undersigned, being twelve disinterested freeholders of the town of \_\_\_\_\_, having met on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, in the town of \_\_\_\_\_, and having been duly sworn, well and truly to determine as to the necessity of the private road described in the application of John Dorn, a copy of which application is hereto attached, and to assess the damages occasioned by the laying out and opening of such road, and having viewed the premises through which such road is proposed to be laid out, and having heard the parties and the evidence produced, do hereby certify that in our opinion it is necessary and proper to lay out the private road for the use and benefit of the said John Dorn, pursuant to his said application; that such road shall be \_\_\_\_\_ rods in width and shall run from \_\_\_\_\_ to \_\_\_\_\_ [describe courses and distances] that such road runs through the land owned by Thomas Wood, and we hereby assess his damages at \$ \_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signatures of jurors.]

§ 220. **Value of highway discontinued.**— If the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway running through the lands belonging to a person through whose lands the private road is proposed to be opened, the jury shall take into consideration the value of the highway so discontinued, and the benefit resulting to the person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying out of such private road.

**Derivation.** This section is taken from former Highway Law, section 115, without change.

§ 221. **Papers to be recorded in the town clerk's office.**— The town superintendent shall annex to such verdict the application, and their certificate that the road is laid out, and the same shall be filed and recorded in the town clerk's office.

**Derivation.** This section is taken from former Highway Law, section 116, without change.

The certificate of the town superintendent to the effect that the road is laid out as directed by the verdict, may be in the following form:

**FORM No. 86.**

**Certificate of Town Superintendent Laying Out Private Road.**

Whereas, John Dorn has made a written application to the undersigned, town superintendent of the town of....., in the county of..... to lay out a private road over the lands of ....., for his use and benefit, and twelve disinterested freeholders were summoned as a jury to determine as to the necessity of such private road, and to assess damages therefor, and such jury having convened after due notice to the owners and occupants of the lands through which said road is proposed to be laid out, and, after viewing such lands and hearing the parties and witnesses produced, having delivered their written verdict that said road is necessary and proper and have assessed the damages to be caused thereby, which verdict was dated the ..... day of ....., 19.., and was duly filed with said application in the office of the town clerk of said town on said date, and no motion having been made to the county court to confirm, vacate or modify such verdict.

Now, therefore, I, the undersigned town superintendent of highways of said town, do hereby lay out said private road as so applied for and as directed in such verdict, whereof a survey has been made as follows: [here insert survey bill] and the line of survey is to be the center of the road, which is to be ..... rods in width.

Dated this ..... day of ....., 19..

[Signature of town superintendent.]

§ 222. **Damages to be paid before opening the road.**— The damages assessed by the jury shall be paid by the party for whose benefit the road is laid out, before the road is opened or used; but if the jury shall certify that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, such damages shall be paid by the town and refunded to the applicant.

**Derivation.** This section is taken from former Highway Law, section 117, without change.

**Payment of damages.** A private road cannot be opened until the damages have been assessed and paid. *Mohawk & Hudson River R. R. Co. v. Archer*, 6 Paige, 83 (1836). The damages are to be paid by the person for whose benefit the road is laid out, when so paid the road belongs to the applicant so long as it is used as a road. *Taylor v. Porter*, 4 Hill, 140 (1843). See *Matter of Lawton*, 22 Misc. 426, 50 N. Y. Supp. 408 (1898).

§ 223. **Fees of officers.**— Every juror, in proceedings for a private road, shall be entitled to receive for his service one dollar and fifty cents; and town superintendents their per diem compensation to be paid by the applicant.



**Derivation.** This section is taken from former Highway Law, section 118, without change.

The compensation of town superintendent is fixed by the town board and may not be less than two nor more than five dollars for each day. See Highway Law, § 45, *ante*, p. 42.

§ 224. **Motion to confirm, vacate or modify.**— Within thirty days after the decision of the jury shall have been filed in the town clerk's office, the owner or occupant may apply to the county court of the county wherein such private road is situated, for an order confirming, vacating or modifying their decision; and such court may confirm, vacate or modify such decision as it shall deem just and legal. If the decision is vacated, the court may order another hearing of the matter before another jury, and remit the proceedings to the town superintendent of the same town for that purpose. If no such motion is made, the decision of the jury shall be deemed final. The motion shall be brought on, upon the service of papers on the adverse party in the proceeding, according to the usual practice of the court in actions, and special proceedings pending therein, and the decision of the county court shall be final, except that a new hearing may be had, as herein provided. If the final decision shall be adverse to the applicant, no other application for the same road shall be made within two years.

**Derivation.** This section is taken from former Highway Law, section 119, without change.

The practice on the motion to confirm, vacate or modify the decision of the jury is similar to that prescribed in section 199 upon a motion to confirm, vacate or modify the decision of the commissioners appointed to lay out, alter or discontinue a highway. Reference should be made to the notice under section 199 in connection with this section.

For procedure under acts of 1853 and 1860 from which former section 119 was derived, see *West v. McGurn*, 43 Barb. 198 (1864).

**Appeal from verdict.** The county court has no power to appoint commissioners to hear an appeal from the decision of a jury laying out a private road. *People ex rel. Keenholts v. Robinson*, 29 Barb. 77 (1858). It will be presumed that the jury found for the necessity of the private road where the contrary does not appear by the record. *People ex rel. Cashman v. Heddon*, 32 Hun, 299 (1884).

§ 225. **Costs of new hearing.**— If upon a new hearing, the damages assessed are increased, the applicant shall pay the costs and expenses thereof, otherwise the owner shall pay the same.

**Derivation.** This section is taken from former Highway Law, section 120, without change.

§ 226. For what purpose private road may be used.— Every such private road, when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road; nor shall the occupant or owner of the land through which said road shall be laid out be permitted to use the same as a road, unless he shall have signified such intention to the jury who assessed the damages for laying out such road, and before such damages were assessed.

**Derivation.** This section is taken from former Highway Law, section 121, without change.

**Nature of use of private road.** A private road is paid for and owned by the applicant. The public has no title to nor interest in it. No citizen has the right to use such a road as he does a public highway. He can use it only when he has business with the road owner. He can justify an entry on the road only when he could justify an entry on the land over which the road passes; unless he has given notice of such an intention before damages were assessed, he has no right to use the road for his own purposes. *Taylor v. Porter*, 4 Hill, 140 (1843); *Lamber v. Hoke*, 14 Johns. 383 (1817); *Herrick v. Stover*, 5 Wend. 580 (1830); *Drake v. Rogers*, 3 Hill, 604 (1842).

§ 227. Highways or roads along division lines.— Whenever a highway or private road shall be laid along the division line between lands of two or more persons, and wholly upon one side of the line, and the land upon both sides is cultivated or improved, the persons owning or occupying the lands adjoining such highway or road shall be paid for building and maintaining such additional fence as they may be required to build or maintain, by reason of the laying out and opening such highway or road; which damages shall be ascertained and determined in the same manner that other damages are ascertained and determined in the laying out of highways or private roads.

**Derivation.** This section is taken from former Highway Law, section 122, without change.

**Application of section.** This section is to be taken in connection with the statute requiring adjacent owners of land to maintain division fences, but has no application to lands adjoining railroads, as the latter are required to maintain all the fences along their line. *Matter of Pugh*, 22 Misc. 43, 49 N. Y. Supp. 398 (1897), reversed on other grounds 46 App. Div. 634, 61 N. Y. 1145.

Where a highway is laid out along the line of a farm, taking no portion of the land of the owner, but subjecting him to the expense of maintaining the whole fence, the expense of half of which was formerly borne by him, such owner is not entitled under the existing Highway Law to compensation even though the jury allowed him damages. It is a *casus omissus*. *People ex rel. Newton v. Supervisors of Oneida*, 19 Wend. 102 (1838).

§ 228. **Adjournments.**— If any accident shall prevent any of the proceedings required by this chapter relating to the laying out, altering or discontinuing of a highway, or the laying out of a private road, to be done on the day assigned, the proceedings may be adjourned to some other day, and the town superintendent shall publicly announce such adjournment.

**Derivation.** This section is taken from former Highway Law, section 123, without change.

§ 229. **Widening roads; petition.**— When any part of a highway in any town of this state, not in an incorporated village or city, running between two or more villages or cities, has, because of the wearing away by a river or stream or any other natural cause, become narrower than the width required by statute, and is dangerous to the users of such highway, twelve or more resident taxpayers of such town may present a petition to the county court of the county within which such town is situated. The petition shall describe the part of the highway proposed to be widened and state that such highway has become lessened in width by the action of a river or stream or other cause, that it is dangerous to the traveling public, that the widening and improvement of such highway is necessary for the public convenience and welfare, that the highway is an important leading road between two or more cities or villages, that the cost of such widening and improvement would exceed the sum of two thousand five hundred dollars and would be too burdensome on the town or towns otherwise liable therefor. Such petition shall be verified by at least three of the petitioners. On receipt of the petition the county court shall forthwith appoint three commissioners who shall not be named by any person interested in the proceedings and who shall be taxpayers of such county, but who shall not reside in the town or towns in which the highway, proposed to be widened and improved, is situated.

**Derivation.** This section is taken from L. 1893, chap. 607, § 1.

The object of this and the succeeding sections is to provide for the rebuilding of a highway along a river or stream which has become unsafe because of the wearing away of the highway by such river or stream. A proceeding cannot be brought for such purpose unless the cost of the widening of a highway and the improvement would exceed the sum of \$2,500. In such a case one-half of the expense is chargeable against the county and the other half is to be paid by the town.

§ 230. **Powers and duties of commissioners.**— The commissioners shall take the constitutional oath of office and appoint a time

and place for a meeting to hear all persons interested in the proposed widening of the highway. They shall personally examine the part of the highway proposed to be widened, hear any reasons for or against such widening and ascertain the probable cost of the work. They shall have power to issue subpoenas, administer oaths and examine witnesses; they shall keep the minutes of their proceedings and reduce to writing all oral evidence given before them. They shall make duplicate certificates of their decision, filing one in the town clerk's office of the town in which the said highway is located, and the other, with such minutes and evidence, in the county clerk's office of the county where the highway is located. Such commissioners shall have the same power as to the assessment of damages caused by the widening of such highway as commissioners appointed under this article for the discontinuance, alteration or laying out of a highway, and as to such assessment the same proceeding may be had for the confirmation, vacating or modifying of such decision, as provided in and by this article. The commissioners shall receive a compensation of five dollars for each day necessarily spent in the performance of their duties under this section, and the amount so paid to the said commissioners shall be a charge upon the town or towns in which the highway, proposed to be widened as aforesaid, is located.

**Derivation.** This section is taken from L. 1893, chap. 607, § 2, without change.

§ 231. **Notice of decision to supervisors.**— If a majority of the commissioners shall determine that the proposed widening of the highway is necessary and that the cost thereof would be too burdensome for the town, exceeding in probable cost two thousand five hundred dollars, they shall notify the board of supervisors of the county of such decision. The board of supervisors shall thereupon cause one-half of the amount of the estimated cost to be raised by the county and paid to the supervisor of the town or towns in which that part of the highway proposed to be widened as aforesaid is located, and said supervisor shall apply the sum so received by him towards the payment of the cost of such widening. The balance of the expense shall be raised in the manner provided by law, by the town or towns in which that part of the highway proposed to be widened as aforesaid is located.

**Derivation.** This section is taken from L. 1893, chap. 607, § 3, without change.

§ 232. **Widening, how constructed.**— The town superintendent shall construct such widening of the highway according to plans and specifications adopted by the district or county superintendent and approved by the town board of his town. The bills and expenses incurred in such work shall be audited by the town board and paid by the supervisor upon written order of the town superintendent, after the same shall have been approved by the town board, out of moneys raised for such purpose as provided in the preceding section.

**Derivation.** This section is taken from L. 1893, chap. 607, § 4. Under the former law the plans and specifications were adopted by the commissioner of highways and approved by the town board.

§ 233. **Actions to compel widening; how affected by petition.**— In case an action might lie in any court of this state against the town superintendent of any town or towns to compel such superintendent to widen a part of a highway, the width of which has become less than that required by statute, or in case an action has been brought against such superintendent to compel him to widen a part of a highway, the width of which has become less than that required by statute, the presentation of a verified petition to the county court as provided for in section two hundred and twenty-nine shall prevent the commencing of any such action as aforesaid and cause such an action already commenced, to cease, and shall be a bar to a recovery on the part of the plaintiff of a judgment against such superintendent in any such action instituted or prosecuted to judgment after the passage of this chapter.

**Derivation.** This section is taken from L. 1893, chap. 607, § 5.

§ 234. **Highways abandoned.**— Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; but the period during which any action or proceeding shall have been, or shall be pending in regard to any such highway, shall form no part of such six years; and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said periods shall be deemed abandoned as a right of way. The town superintendents shall file, and cause to be recorded in the town clerk's office of the town, a written description, signed by them, of each

highway and public right of way so abandoned, and the same shall thereupon be discontinued. There may also be a qualified abandonment of a highway under the following conditions and for the following purposes, to wit: Where it appears to the town superintendents, at any time, that a highway has not become wholly disused as aforesaid, but that it has not for two years next previous thereto, been usually traveled along the greater part thereof, by more than two vehicles daily, in addition to pedestrians and persons on horseback, they shall file and cause to be recorded in the town clerk's office a certificate containing a description of that portion of the highway partly disused as aforesaid and declaring a qualified abandonment thereof. The effect of such qualified abandonment, with respect to the portion of said highway described in the certificate, shall be as follows: It shall no longer be worked at public expense; it shall not cease to be a highway for purposes of the public easement, by reason of such suspension of work thereon; no person shall impair its use as a highway nor obstruct it, except as hereinafter provided, but no person shall be required to keep any part of it in repair; wherever an owner or lessee of adjoining lands has the right to possession of other lands wholly or partly on the directly opposite side of the highway therefrom, he may construct and maintain across said highway a fence at each end of the area of highway which adjoins both of said opposite pieces of land, provided that each said cross-fence must have a gate in the middle thereof at least ten feet in length, which gate must at all times be kept unlocked and supplied with a sufficient hasp or latch for keeping the same closed; all persons owning or using opposite lands, connected by such gates and fences, may use the portion of highway thus inclosed for pasturage; any traveler or other person who intentionally, or by wilful neglect, leaves such gate unlatched, shall be guilty of a misdemeanor, and the fact of leaving it unlatched shall be prima facie evidence of such intent or wilful neglect. Excepting as herein abrogated, all other general laws relating to highways shall apply to such partially abandoned highway.

**Derivation.** This section is taken from former Highway Law, section 99, as amended by L. 1907, chap. 246, without change.

**Abandonment in general.** A highway when once established continues to be such until discontinued according to law. The presumption is in favor of its continuance. *City of Cohoes v. The D. & H. C. Co.*, 134 N. Y. 397 (1892); *Driggs v. Phillips*, 103 N. Y. 77 (1886); *Adams v. S. & W. R. R. Co.*, 11 Barb. 414 (1851). The burden of establishing that a highway has ceased to

be such rests upon the party making the claim. *Horey v. Village of Haverstraw*, 124 N. Y. 273 (1891); *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397 (1892); *Matter of Woolsey*, 95 N. Y. 135 (1884). The public alone, not an individual, can work an abandonment of a public highway. *Amsbey v. Hinds*, 46 Barb. 622 (1866), affirmed 48 N. Y. 57.

A town meeting has no power to discontinue a highway once established. That can be done only by the intervention of the authorities and according to the procedure pointed out in the statutes, and a town meeting is no part of these. *Hughes v. Bingham*, 135 N. Y. 347 (1892).

**Modes of abandonment.** This section provides for abandonment of a highway, (1) where a highway has not been opened and worked within six years from the time it was dedicated to the public, or laid out by the town superintendent either with or without the proceedings provided for by this article; (2) where a highway has not been traveled or used as a highway for six years. Besides these two methods a highway may be discontinued and closed after proceedings had for such purpose as provided in this article.

**Failure to open and work.** The time during which proceedings are pending to lay out the highway is not included within the period within which the highway must be laid out and worked. The dedication referred to is where the owner of land has dedicated it to the town for a highway as provided in section 191. Where such a dedication is completed by acceptance on the part of the proper authorities, the time begins to run and the highway must be opened and worked. A highway dedicated to the public but not yet accepted by the authorities cannot be considered as abandoned after a lapse of six years but before acceptance by the authorities, where there has been no revocation. *Bridges v. Wyckoff*, 67 N. Y. 130 (1876); *Rathgaber v. Village of Tonawanda*, 37 N. Y. St. Rep. 807, 13 N. Y. Supp. 937 (1891).

Prior to 1861, the provision that a highway must be opened and worked within six years from the time of its being laid out, to make it a highway, did not relate to highways dedicated to the use of the public by the owners themselves, but was intended to apply exclusively to highways laid out by proceedings in which lands were to be taken without the owner's consent. The act seems to have been passed with the idea that in the case of a highway laid out by proceedings *in invitum* it is but just that the land should revert to the owner, if not used by the public as a highway within a reasonable time; but in the case of a highway by dedication, there was no need of such a provision, as the proprietor could revoke the proposed revocation at any time before acceptance by the public. *McMannis v. Butler*, 51 Barb. 436 (1868). There can be no question as to application of the present law to highways which have been dedicated to public use. It expressly provides that where a highway is so dedicated it may be abandoned by failure to open and work. And every public right of way, however acquired may cease to be a highway by nonuser for a period of six years. This provision was inserted in the former Highway Law by the amendment of 1899, chap. 622. The provision requiring a road to be opened and worked within six years from the time of its being laid out applies to highways dedicated by the owner as well as those laid out by proceedings *in invitum*. *Lndlow v. City of Oswego*, 25 Hun, 260 (1881); *Buffalo, N. Y. & P. R. R. Co. v. Overton*, 35 Hun, 157 (1885).

When a highway has been laid out, surveyed, and an order entered by the town superintendent as provided in section 190, after an application for and the appointment of commissioners and a determination by them as to the necessity thereof, such highway must be laid out, opened and worked by the town superintendent within the period of six years. The period begins to run from the date of the entry of the order laying out the highway. The section is not limited in its application by the language of the first sentence to highways "laid out and dedicated," but applies as well to those created by user. *Amsbry v. Hinds*, 48 N. Y. 57 (1871).

Where a particular place claimed to be a public highway has never been opened, worked or used as a highway, it cannot be proved by parole that it is a highway; it would amount to defeating owners of title to real estate by parole evidence. *Harrington v. People*, 6 Barb. 607 (1849).

The requirement to open and work a highway implies that it must be made passable as a highway for public travel its entire length. It need not be a first-class road, it need not be finished, but it must be sufficient to enable the public to pass over it. *Beckwith v. Whalen*, 70 N. Y. 430 (1877); *City of Buffalo v. Hoffeld*, 6 Misc. 197, 27 N. Y. Suppl. 869 (1893). The statute does not prescribe how much or how well the highways shall be worked; if opened and worked at all, it will not lose its legal existence. *Marble v. Whitney*, 28 N. Y. 297 (1863); *McCarthy v. Whalen*, 19 Hun, 503 (1880). A highway may be shifted to one side in such a manner and to such an extent as to create an abandonment of the portion from which the shift is made. *Mangam v. Village of Sing Sing*, 26 App. Div. 464, 50 N. Y. Suppl. 647 (1898).

The statute applies only where there has been a failure to open or work the highway at all, and not where the highway has been in full use for the whole time, but has not been laid out to its full width or its width has been contracted. *Walker v. Caywood*, 31 N. Y. 51 (1865). The whole width of the highway need not be traversable by vehicles, nor are those parts not used by teams considered abandoned. *Mangam v. Village of Sing Sing*, 26 App. Div. 464, 50 N. Y. Suppl. 647 (1898).

**Opening and working part of highway.** It is essential that the highway be opened over its entire route. But it need not be worked in every part, but must be worked sufficiently to be passable for public travel. *MacVee v. City of Watertown*, 92 Hun, 306, 36 N. Y. Suppl. 870 (1895). The failure to open a portion of a highway will not invalidate so much thereof as is opened and worked in compliance with the statutes. *Vandemark v. Porter*, 40 Hun, 397 (1886).

Where a highway is opened and worked for a portion of the full distance within the statutory period, but is not so worked as to the remainder, it ceases to be a highway for any purpose at the place where it is not opened and worked. *Christy v. Newton*, 60 Barb. 332 (1871). So also as to the portion of a highway which has been fenced off and not used by the public for a period of six years. *Lyon v. Munson*, 2 Cow. 426 (1823). As to whether, when part of a highway is opened and worked, within six years after it is laid out, so as to be passable and the residue is not, the whole road ceases to be a highway, or whether the part opened and worked will remain a highway, *quære*. *Beckwith v. Whalen*, 70 N. Y. 430 (1877). In this case the use of the entire highway was affected by the failure to open and work a portion of it.



If a part of a highway ceases to be traveled and used for a period of six years, such part is no longer a highway; it does not follow that because a portion of that which was originally laid out as a continuous highway remains such, all of it does. *Horey v. Village of Haverstraw*, 124 N. Y. 273 (1891); *Lyon v. Munson*, 2 Cow. 426 (1823); *Christy v. Newton*, 60 Barb. 332 (1871).

**Abandonment by non-use.** As a road is not declared to be opened and worked, within the meaning of the statute, which is not made passable for teams within six years, so a road which for six years is not only not used and traveled, but is impassable for conveyances of any kind, is fenced off and the public travel by another route, presents the situation upon which the statute must operate to destroy its legal character as a highway, and it matters not that at the beginning the road was rendered impassable and fenced off by a trespasser. Indeed such must always be the case, unless it be done by the public authorities. *Horey v. Village of Haverstraw*, 124 N. Y. 273 (1891); *Mangam v. Village of Sing Sing*, 26 App. Div. 464, 50 N. Y. Suppl. 647 (1898).

While there can be no adverse possession of a highway as against the public, the latter may abandon its claim thereto and nonuser is some evidence of such intent. And when in connection with nonuser there is affirmative evidence of a clear intention to abandon, the public interest is extinguished. *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381 (1890), affirmed 130 N. Y. 618. So of a private road. *Crain v. Fox*, 16 Barb. 184 (1853); *Corning v. Gould*, 16 Wend. 531 (1837).

**Obstruction as an abandonment.** Use of land formerly a public highway for the construction and maintenance of a private dock for a period of more than sixty years operates to extinguish the public easement therein, both under the rules applicable to adverse possession and under the provisions of the above section. *City of Buffalo v. D., L. & W. R. R. Co.*, 68 App. Div. 488, 74 N. Y. Supp. 343 (1902), affirmed 178 N. Y. 561. A highway cannot be declared abandoned merely because bars and gates have been placed across it for the accommodation of abutting owners. *People ex rel. De Groat v. Marlett*, 41 Misc. 151, 83 N. Y. Supp. 962 (1903).

**Mandamus to compel superintendent to open highway.** The act of a town superintendent in filing and causing to be recorded the description of a highway abandoned pursuant to this section, is not a judicial act involving discretion which can be reviewed only by a writ of certiorari, but may be reviewed upon an application to compel him to open such highway for public use. *People ex rel. De Groat v. Marlette*, 94 App. Div. 592, 88 N. Y. Supp. 379 (1904).

**Village and city streets.** This section applies to village streets when laid out as highways. *Horey v. Town of Haverstraw*, 124 N. Y. 273 (1891); *E. B. Co. v. Village of Haverstraw*, 142 N. Y. 146 (1894). But has been held not to apply to city streets. *Palmer v. East River Gas Co.*, 115 App. Div. 677, 101 N. Y. Supp. 347 (1906); unless it appears that the city has acquired the fee to the lands. *Raynor v. Syracuse Univ.*, 35 Misc. 83, 71 N. Y. Supp. 293 (1901).

Chapter 311 of L. 1861, amending R. S., pt. 1, chap. 16, tit. 1, § 99, from which section 99 of the former Highway Law was in part derived, was held not to be limited in its effect to such highways as were laid out within

six years prior to the passage of the Act of 1861, but that the act applied to a highway laid out in 1800. *Townsend v. Bishop*, 61 App. Div. 18, 70 N. Y. Supp. 201 (1901).

But a city street may be so abandoned where it was acquired by the public originally as a highway; the distinction between highways in towns and the streets of a city is that in the former the public acquires simply a right of way in lands taken from a highway, the fee remaining in the owner, while in the latter the municipality obtains the fee in streets laid out under its charter. *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381 (1890), affirmed 130 N. Y. 618; *Vanderbeck v. City of Rochester*, 46 Hun, 87 (1887); *Matter of Lexington Ave.*, 29 Hun, 303 (1883), affirmed 92 N. Y. 629; *City of Buffalo v. Hoffeld*, 6 Misc. 197, 27 N. Y. Supp. 869 (1893). Section applied generally. *People ex rel. Yonkers v. The N. Y. C. & H. R. R. Co.*, 69 Hun, 166, 23 N. Y. Supp. 456 (1893); *Chapman v. Gates*, 46 Barb. 317 (1866).

**Certificate of abandonment.** The town superintendent must file and cause to be recorded a certificate signed by him, containing a description of the highway abandoned, and thereupon such highway shall be discontinued. Such certificate may be in the following form:

#### FORM No. 87.

##### Certificate of Abandonment of Highway.

I, the undersigned, town superintendent of highways of the town of \_\_\_\_\_, county \_\_\_\_\_, hereby certify that the highway beginning at [here describe highway or portion thereof abandoned] has not been traveled or used as a highway for a period of more than six years prior to the date hereof [or, has not been opened or worked for a period of more than six years since the dedication thereof (or, since the same was laid out)], and has been abandoned within the meaning of section 234 of the Highway Law, and pursuant to such section the same is discontinued.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

[Signature of town superintendent.]

§ 235. **Highways in lands acquired by the United States for fortification purposes deemed abandoned.**—When land sought to be acquired by the United States of America for the purpose of fortifications includes a highway or portion thereof, the condemnation proceedings may include such highways or portion thereof, and the people of the state of New York, any municipality, county or other party claiming an interest therein may be made a party defendant in such proceeding, and the interest of the state, county, municipality or other claimant be determined, and the award made therefor. Forthwith upon the acquisition by the United States of America of land which includes a highway or portion thereof, there shall be filed in the office of the town clerk of the town, and also in the office of the county

clerk of the county, in which such land is located, certified copies of the record or transfer to the United States of such land, together with a map of such land, on which map such highway or portion thereof shall be indicated by metes and bounds, and thereupon such highway or portion thereof shall be deemed discontinued and abandoned for highway purposes, and if proceedings have been taken, pursuant to article six of this chapter for the improvement of such highway by state aid, all such proceedings, together with any appropriation made for the improvement of such highway or portion thereof, as indicated on such map, shall be deemed revoked, vacated and set aside.

**Derivation.** This section is taken from L. 1907, chap. 404, § 2.

§ 236. **Discontinuance of highway.**— Whenever the town superintendent of any town, in which during the past ten years there has been expended the sum of three hundred thousand dollars, or more, for the purpose of macadamizing the highways of such town, shall determine that any portion of any highway or street, not within the limits of an incorporated village, which is the terminus of such street or highway, is unnecessary for highway purposes, and said town superintendent may, by an order to be duly entered in the town clerk's office, direct such highway to be discontinued and abandoned for public purposes. Provided, however, that no portion of such highway to be discontinued shall be greater than one thousand feet of the terminus thereof and that the owners of the land on both sides of such highway or street, for the distance it is proposed to discontinue the same, shall, by written petition to such town superintendent have requested the discontinuance thereof.

**Derivation.** This section is taken from L. 1895, chap. 611 § 1, as amended by L. 1903, chap. 643, without change.

The object of this section was to provide for the discontinuance of certain highways in towns where the conditions imposed had been complied with. While general in its terms it is temporary and special in fact and is now probably obsolete.

§ 237. **Description to be recorded.**— Immediately upon making and entering the order mentioned in section two hundred and thirty-six of this chapter, the said town superintendent shall cause a written description of that portion of the street or highway ordered to be discontinued to be filed and recorded in the office of

the town clerk of the town in which the said street or highway is located, and when the same is duly recorded the said portion of the said street or highway shall thereupon be and become duly abandoned and discontinued for highway purposes.

**Derivation.** This section is taken from L. 1895, chap. 611 § 2, without change.

§ 238. **Damages caused by discontinuance.**—Any person or corporation interested as owner or otherwise in any lands and claiming any loss or damage, legal or equitable, by reason of the discontinuance, abandonment or closing of any street or highway, not within the limits of an incorporated village, under or pursuant to the provisions of the last two sections, may, upon ten days' written notice to the town superintendent of the town in which such lands are situated apply to the supreme court or to the county court of the county within which such lands are situated for the appointment of commissioners to estimate and determine such loss and damage, whereupon the court shall appoint three disinterested commissioners of appraisal to estimate and determine such damage, and the amount of compensation to be paid by said town therefor, who shall make their report thereupon to such court, and which report when finally confirmed shall be final and conclusive in respect thereto, and the legality and equity of any and all such claims shall be determined by such commissioners and by the court upon the hearing of their report. Any loss or damage so estimated and determined shall be paid by said town as in case of judgment.

**Derivation.** This section is taken from L. 1896, chap. 464, §§ 1 and 2, without change.

§ 239. **Papers, where filed.**—All applications, certificates, appointments and other papers relating to the laying out, altering or discontinuing of any highway shall be filed by the town superintendent as soon as a decision shall have been made thereon in the town clerk's office of the town.

**Derivation.** This section is taken from former Highway Law, section 150, without change.

**Certificates, minutes and evidence** in proceedings before commissioners for the laying out, alteration or discontinuance of highways are required to be filed in the county clerk's office of the county in which the highway or proposed highway is located. Highway Law, § 194, *ante*, p. 250. Certified copies

of the final determination, order and papers relating to, or filed or entered in, such proceedings are to be filed and recorded in the town clerk's office of the town where the highway is located. Highway Law, § 208, *ante*, p. 286. The verdict of the jury and the application in proceedings to lay out a private road are to be so filed and recorded. Highway Law, § 221.

A mere informality in recording should not be deemed fatal where there is a substantial compliance with the requirements. *McCarthy v. Whalen*, 19 Hun, 503 (1880). Where the original order of the commissioners appointed by the court, after being filed and recorded in the office of the town clerk, was lost, it is competent to introduce a sworn copy of the original as evidence tending to show the loss of the original order; the statutory requirement for filing and recording the original does not preclude other secondary evidence than the record of its contents. *Chapman v. Gates*, 54 N. Y. 132 (1873).

**Papers public records.** All papers filed and recorded with the town clerk as provided in this article become public records and prove themselves; and it is unnecessary that the signatures of the persons, by whom they purport to be signed, be proved. *Van Bergen v. Bradley*, 36 N. Y. 316 (1867). An application for laying out a highway is a public document and belongs to the town clerk's office; and if it come into the hands of a stranger the latter may be compelled to put it on file with the clerk for the instruction of a person a party to the suit in which the road is in question. *People ex rel. Palmer v. Vail*, 2 Cow. 623 (1824).

§ 240. **Costs of motion.**— Costs of a motion to confirm, vacate or modify the report of commissioners appointed by the court to lay out, alter or discontinue a highway may be allowed in the discretion of the court not exceeding fifty dollars. On an uncontested motion to confirm the report of the commissioners so appointed, if said report is favorable to the applicant and confirmed by the court, costs may be allowed not exceeding fifty dollars sufficient to compensate the applicant's attorney for his services in the proceedings. Costs of any other motion in a proceeding in a court of record, authorized by this chapter, may be allowed in the discretion of the court not exceeding ten dollars.

**Derivation.** This section is taken from former Highway Law, section 152, as amended by L. 1904, chap. 192, without change.

**Award of costs.** The provisions of this section only relate to the costs of motions made in a proceeding in respect to highways, as distinguished from the costs of the proceeding itself. Such a proceeding is a special proceeding and the court may award costs in its discretion pursuant to section 3240 of the Code of Civil Procedure. *Matter of Peterson*, 94 App. Div. 143, 87 N. Y. Supp. 1014 (1904). The costs referred to in section 202, *ante*, are costs which may be allowed to one of the parties under the provision of this section. *People ex rel. Bevins v. Supervisors*, 82 Hun, 298, 31 N. Y. Suppl. 248 (1894).

**ARTICLE IX.****Bridges.**

- Section 250. When town or county expense.  
251. Levy of tax upon county.  
252. Penalty, and notice on bridge.  
253. Offense.  
254. Joint liabilities of towns and their joint contracts.  
255. Refusal to repair.  
256. Proceedings in court.  
257. Supervisor to institute proceedings.  
258. Duty of superintendents.  
259. Report of town superintendents, and levy of tax.  
260. Appeals.  
261. Power of court on appeal.  
262. Refusal to repair bridges.

§ 250. **When town or county expense.**—The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges constructed over streams or other waters within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries, except between the counties of Westchester and New York; and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses. When such bridges are constructed over streams or other waters forming the boundary line between a city of the third class and a town, such city and town shall be liable each to pay its just and equitable share of the expenses for the construction, maintenance and repair of such bridges. Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article. Each of the counties of this state shall also be liable to pay for the construction, care, maintenance, preservation and repair of public bridges, lawfully constructed over streams or other waters forming its boundary line, not less than one-sixth part of the expenses of such construction, care, maintenance, preservation and repair.

**Derivation.** This section is derived from former Highway Law, section 130, as amended by L. 1902, chap. 321, without change in substance.

**Object and effect of section.** This section provides for the payment of the expense of the construction and repair of four classes of bridges. First, bridges over streams within the boundaries of a town, which are to be con-

structed and maintained at the expense of the town; second, bridges over streams or other waters constituting the boundary line of towns, which are to be constructed and maintained at the joint expense of such towns; third, bridges over streams forming the boundary line between a city of the third class and a town, which are to be constructed and maintained at the joint expense of the city and town; fourth, bridges over streams or other waters forming the boundary line of the county for which the county is liable for not less than one-sixth part of the expense of construction and maintenance.

**Streams upon boundaries.** Where a boundary line between towns is the bank of a stream, such stream is included within the expression, "streams or other waters upon their boundaries," as contained in this section. *Town of East Fishkill v. Town of Wappinger*, 97 App. Div. 7, 89 N. Y. Supp. 599 (1904). The term "streams dividing such towns," used in section 256, *post*, was intended to be synonymous with the term "streams upon their boundaries," used in section 250, and the remedy afforded by section 256 extends to all cases in which liability is imposed by section 250. *Matter of Freeholders of Madrid*, 44 Misc. 431, 90 N. Y. Supp. 110 (1904).

**County aid.** As above indicated the county is liable for at least one-sixth of the cost and expense of constructing and maintaining a bridge over a stream forming a county boundary. Prior to L. 1895, chap. 416, amending section 130 of the former Highway Law, a fixed liability was imposed upon the county for the construction and repair of all bridges within the county, based upon the relation between the cost of town bridges and their maintenance and the taxable value of property within the town. The amendment of 1895 eliminated this liability.

It is provided by section 63 of the County Law that the board of supervisors of a county may aid a town which is unreasonably burdened with the expense of the construction and repair of bridges, in an amount not exceeding \$2,000 in any one year. By section 64 of the County Law the board of supervisors may provide for the reconstruction of a bridge which has been destroyed by the elements, in case the expense of such reconstruction would be too burdensome upon the town or towns liable therefor. It is also provided in section 61 of the County Law that the board of supervisors may, upon application of taxpayers, construct or repair a bridge within the county if satisfied that the interest of the county will be promoted thereby, and the expense thereof will be a county charge. It will thus be noticed, notwithstanding the liability imposed by this section upon the town for the construction and repair of bridges, that relief may be afforded a town, in the discretion of the board of supervisors, by the construction and repair of such bridges at the expense of the county.

Mandamus will lie to compel the boards of supervisors to take action with regard to the duty imposed upon the counties. But the court cannot control their discretion in determining the manner in which they shall execute the duty, provided they act in good faith. *People ex rel. Keene v. Supervisors*, 142 N. Y. 271 (1894).

The act of 1895, chap. 416, amending section 130 of the former Highway Law, took away the right of a town to compel the county to pay one-third of the excess when in one year the cost of construction and maintenance of bridges in such town exceeded one-sixth of one per cent. of the assessed valuation. *Town of Wirt v. Supervisors*, 90 Hun, 205, 35 N. Y. Supp. 887 (1895).

The act of 1895 was held not to apply to bridges completed prior to its taking effect. *Stone v. Supervisors*, 166 N. Y. 85 (1901).

**Powers of board of supervisors.** Originally, and as one of the attributes of State sovereignty, the power to lay out highways and to build bridges connecting them over streams, for the use of the public, and to levy taxes for that purpose, belonged to the State Legislature; in the exercise of its discretion, it could delegate the exercise of such power to boards of supervisors. It was therefore formerly held that the board of supervisors of a county having within it two towns separated by a stream, may, upon proper application of one of such towns, enact a law authorizing and compelling the erection of a bridge over such a stream to connect highways in said towns, and imposing a tax upon them to pay the expense thereof, although the officers of one of them, and a majority of its taxpayers were opposed, and expressed their dissent by a vote at a regular town meeting. *Town of Kirkwood v. Newbury*, 122 N. Y. 571 (1890).

**Liability of towns.** This section makes absolute the liability of the town to construct and maintain bridges over streams within its bounds. Every town is liable for injuries resulting to persons or property by defects in bridges. Highway Law, § 74, *ante*, p. 103. Prior to the act of 1841 towns had no statutory authority to build bridges. By that act they could be compelled to, though reluctant. *Phelps v. Hawley*, 52 N. Y. 23 (1873). Prior to act of 1890, chap. 568, the burden of supporting bridges was cast upon the towns alone. *Town of Wirt v. Supervisors*, 90 Hun, 205, 35 N. Y. Supp. 887 (1895). For common law rules and history of New York State legislation relating to liability for construction and maintenance of bridges, see *People ex rel. Root v. Supervisors*, 81 Hun, 216, 30 N. Y. Supp. 729 (1894), affirmed 146 N. Y. 107; *Bartlett v. Crozier*, 17 Johns. 439, 452 (1820).

**Joint liability of towns.** Where a bridge is constructed over a stream forming a boundary line of towns, either in the same or adjoining counties, such towns are jointly liable to pay the expense of construction and repair. For the purpose of apportioning the expense of such construction and repair between the towns, as provided in this article, a city of the third class is to be deemed a town. Sections 254-262 are for the purpose of providing for the enforcement of the joint liability in respect to such bridges.

The board of supervisors may apportion the expense of the construction and repair of a bridge over a stream constituting a boundary line of a county, which is also intersected by the boundary line of two or more towns in the county between the county and such towns. County Law, § 65. If provision has been made by the towns to borrow money for the construction of a bridge over a boundary line, the board of supervisors may, if application be made by each of the towns, apportion the expense thereof among such towns, in such proportion as it shall deem to be just. Highway Law, § 97, *ante*, p. 138.

The general rule is that the expense of constructing and maintaining bridges over boundary lines of towns must be equally borne by the towns. *People ex rel. Root v. Supervisors*, 81 Hun, 216, 30 N. Y. Supp. 729 (1894), affirmed 146 N. Y. 107; *Beckwith v. Whalen*, 70 N. Y. 430 (1877). The cost of a bridge between two towns over a stream, not navigable tide water, should be divided equally between them regardless of their relative wealth and population. *Matter of Spier*, 20 N. Y. St. Rep. 389, 3 N. Y. Supp. 438 (1888), affirmed 115 N. Y. 665.



In order that towns may be jointly liable for the construction of a bridge over a stream forming their boundary, such bridge must connect a lawful highway in each town; but the fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare suitable for travel. *Beckwith v. Whalen*, 70 N. Y. 430 (1877); *People ex rel. Keene v. Supervisors*, 151 N. Y. 190 (1896). The necessary approaches are part of a free bridge, and both towns are equally and jointly liable for an approach built in either town. *Edwards v. Ford*, 22 App. Div. 277, 47 N. Y. Supp. 995 (1897).

The provisions as to joint liability of towns for bridges constructed over streams on their boundary, apply to bridges that connect with land within the boundaries of the town sought to be charged, or with a highway therein, which is accessible therefrom. Accordingly such town is not liable for its share of the construction of a bridge a part of the middle of which passes over a small portion of the boundary thereof, but neither end of which is located therein. *Town of Candor v. Town of Tioga*, 11 App. Div. 502, 42 N. Y. Supp. 911 (1896). The court in this case said: "This statute should have a reasonable construction. It is difficult to believe that the legislature intended to make a town liable for the expense of constructing a bridge which does not connect with any land within its boundaries, or with any highway therein, and which is in fact, inaccessible therefrom, merely because the commissioners of highways of adjoining towns, for their own conveniences and purposes, choose to build a bridge, the middle of which passes over a small strip of land within its boundaries."

The consent of the town superintendent of both towns is necessary where a railroad seeks to cross a bridge constructed and maintained jointly by such towns. *Wheatfield v. Tonawanda St. R. R. Co.*, 92 Hun, 460, 36 N. Y. Supp. 744 (1895).

**Powers of town superintendents as to bridges.** Town superintendents have implied power to construct bridges; but such bridges cannot be constructed by them at the expense of the towns or counties unless connected with and forming part of existing highways. *Mather v. Crawford*, 36 Barb. 564 (1862); *Huggans v. Riley*, 125 N. Y. 88 (1890). No other officer than the town superintendent is charged with the erection of a bridge within the town in the absence of other valid provision therefor. Given the means and the necessary authority he can and ought to build a necessary bridge, and he may enter into a valid contract for that purpose in reliance upon there subsequently being raised by tax the amount appropriated therefor. *Berlin Iron Bridge Co. v. Wagner*, 57 Hun, 346, 10 N. Y. Supp. 840 (1890). The power of a town superintendent to contract for a town bridge is subject under the present law to limitations as to amounts which may be expended. He cannot exceed the amount specified to be raised by tax in the annual estimate, Highway Law, § 90, *ante*; unless an additional amount be provided for pursuant to section 92. If a bridge be purchased to replace one destroyed by the elements or otherwise he must secure the approval of the town board, if the contract calls for the expenditure of more than \$500. *Idem*, § 93. Not more than \$1,500 can be raised by tax in any one year for the construction or repair of a single bridge, unless a proposition be adopted at a town meeting. *Idem*, § 94. If the town votes to borrow money for the construction of a bridge, his power to contract is subject to provisions of the proposition

adopted for such purpose. *Idem*, § 97. All of these statutory provisions must be considered by the town superintendent in performing duties respecting town bridges. A town superintendent of highways is not an agent of the town with authority to contract for it in real or supposed emergencies and cannot make a contract binding upon the town unless specifically authorized by statute. *People ex rel. Morey v. Town Board* 175 N. Y. 394; reversing 80 App. Div. 280, 80 N. Y. Supp. 309 (1903).

After a town board has authorized a town superintendent to cause a bridge to be built in the town, the duties of the board, so far as the construction of the bridge is concerned, are at an end. The town board cannot direct him as to the manner of construction nor as to the method by which he shall let the contract, nor as to the person to whom it shall be let. It cannot, after authorizing the construction of the bridge and after it has been constructed, insist that the bridge is unnecessary. And where such board refuses to audit a claim for the full amount of the sum agreed to be paid by the town superintendent, its determination may be amended upon certiorari. *People ex rel. Groton Co. v. Town Board*, 92 Hun, 585, 36 N. Y. Supp. 1062 (1895).

The town superintendent cannot be compelled by mandamus to build a bridge when he is without the necessary funds. *People ex rel. Bently v. Commissioners of Highways of Hudson*, 7 Wend. 474 (1831). See cases cited under section 74, *ante*, p. 103.

**Bridges between Westchester and New York; presentment of claims.** The county of Westchester may employ attorney to present claims against the city of New York for county bridges, but said attorney cannot extend his employment to services relating to the question of damages or change of grade of highways by the city of New York. *People ex rel. Slosson v. Board of Supervisors*, 116 App. Div. 844, 102 N. Y. Supp. 402 (1907).

§ 251. **Levy of tax upon county.**—Each supervisor shall present to the board of supervisors of his county at its annual session a statement specifying the amount paid during the preceding year ending on the thirty-first of October for the construction, care, maintenance, preservation and repair of public bridges over streams or other waters forming the boundary of such county. The board of supervisors shall levy upon the taxable property of the county a sum sufficient to pay its proportion of such expense, and the same when collected shall be paid to the supervisor of such town to be applied by him on the order of the town superintendent after audit as provided in this chapter, toward the payment of such expense.

**Derivation.** This section is derived from former Highway Law, sections 132 and 133. Under the former law the commissioners of highways were required to make the statement of expenditures for the construction or repair of a bridge over a stream constituting the boundary line of a county. Under the above section this statement is to be made by the supervisor. The change was made in conformity with the provisions of sections 104 and 105, making

the supervisor the custodian of the highway and bridge moneys, and requiring expenditures thereof to be made by him.

**Bridge over county boundaries.** This article contemplates that the county shall be liable for a certain portion of the expense of constructing and maintaining a bridge over a stream constituting a county boundary. The portion of the expense to be borne by the county must be levied upon the taxable property of the county and the money when collected is to be paid to the supervisor of the town. The town superintendent of highways is made responsible for the construction and repair of such a bridge and expenditures are to be made by the supervisor upon the order of the town superintendent after audit by the town board, as provided in section 106.

Attorneys, representing the board of supervisors, have no authority to agree upon the facts and submit, under section 1279 of the Code of Civil Procedure a matter in controversy, relating to a claim by a town against a county for part of the expense of building a bridge. *Town of Salamanca v. Cattaraugus Co.*, 81 Hun, 282, 30 N. Y. Supp. 90 (1894).

A statement that is verified and contains a description of the bridge and the whole expense in items incurred by the town during the year preceding for constructing and repairing the same is sufficient. *People ex rel. Root v. Co.*, 81 Hun 216, 30 N. Y. Supp. 790 (1894).

The statement of the expenses incurred by a town for the construction or repair of bridges over a stream forming boundary lines of a county may be in the following form:

**FORM No. 88.**

**Statement as to Repair and Construction of Bridge Over County Boundary.**

To the Board of Supervisors of the county of \_\_\_\_\_ :

The undersigned, supervisors of the town of \_\_\_\_\_, county of \_\_\_\_\_, hereby renders to the board of supervisors of such county, pursuant to section 251 of the Highway Law, a statement of the expenses incurred by such town and the amounts paid during the year ending October 31, 19\_\_\_\_, in the repair [and construction] of the following described bridge [or bridges] over streams [or other waters] constituting the boundary lines of such county.

[Describe location of each bridge and give an itemized account of the expenditures for each.]

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

[Signature of supervisor.]

STATE OF NEW YORK, }  
 COUNTY OF \_\_\_\_\_ } ss.:

A. B., being duly sworn deposes and says that he is the supervisor of the town of \_\_\_\_\_; that the foregoing statement is true, and that the expenditures therein specified were actually and necessarily made by him as such supervisor for the purposes mentioned.

A. B.

Subscribed and sworn to before me }  
 this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[Signature of proper officer.]

§ 252. **Penalty, and notice on bridge.**—The town superintendent may fix and prescribe a penalty, not less than one or more than five dollars, for riding or driving faster than a walk on any bridge in his town whose chord is not less than twenty-five feet in length, and put up and maintain in a conspicuous place, at each end of the bridge, a notice in large characters, stating each penalty incurred.

**Derivation.** This section is taken from former Highway Law, section 143, without change.

§ 253. **Offense.**—Whoever shall ride or drive faster than a walk over any bridge, upon which notice shall have been placed, and shall then be, shall forfeit for every offense, the amount fixed by such town superintendent, and specified in the notice.

**Derivation.** This section is taken from former Highway Law, section 144, without change.

§ 254. **Joint liabilities of towns and their joint contracts.**—Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines, except where the board of supervisors has otherwise apportioned such expense as provided in section ninety-seven. The town superintendents of all the towns, or of one or more of such towns, the others refusing to act, may, when directed by their respective town boards, enter into a joint contract for making and repairing such bridges.

**Derivation.** This section is derived from former Highway Law, section 134. Under the former law the commissioners of highways were independent of control by the town boards. Under the present law the town board is to direct the town superintendent to make joint contracts for constructing and repairing joint bridges.

**Apportionment of expense by board of supervisors.** Where a bridge is situated in two or more towns and such towns propose to provide for the construction thereof by the issue and sale of bonds, the board of supervisors may, upon application by each of the towns, apportion the expense of the construction among such towns, in such proportion as it shall deem to be just. Highway Law, § 97, *ante*, p. 138. This provision is recognized in the exception contained in the first sentence in § 254.

**Joint liability of towns.** Section 250 provides that when bridges are constructed "over streams or other waters forming the boundary lines of towns either in the same or adjoining counties, such towns shall be jointly liable

to pay such expense." Except that an apportionment be made by the board of supervisors as authorized in section 97, the liability must be joint and equal. A provision that a bridge shall be built and maintained at the joint expense of towns means that the expense shall be shared equally, regardless of the portion located in each town. *Lapham v. Rice*, 55 N. Y. 472 (1874); *Day v. Day*, 94 N. Y. 153 (1883); *Marshall v. Hayward*, 74 App. Div. 27, 77 N. Y. Supp. 57 (1902). A submission to arbitration of the extent of the amount to be paid by each town for the construction of a joint bridge is void. *Corey v. Rice*, 4 Lans. 141 (1871).

Where under an agreement between town superintendents one town paid one-half of the expense of building a bridge over a boundary stream and each of the other two towns paid one-quarter, the town paying half cannot recover from the others on the ground that it is liable for but one-third; the error is one of law and not of fact, and the rule as to voluntary payments applies. *Flynn v. Hurd*, 118 N. Y. 19 (1889).

The liability for the cost of construction and for the repair of such bridges is joint and several. *Harris v. Houck*, 57 Barb. 619 (1870); *Theall v. Yonkers*, 21 Hun, 265 (1880). A bridge upon a highway laid out on the line between two towns, partly within the two towns, is maintainable at the joint expense of said towns, and is not to be considered as wholly within the town to which the road district in which it is situated has been allotted. *Day v. Day*, 94 N. Y. 153 (1883).

Liability to a contractor for the construction of such a bridge is joint. *Corey v. Rice*, 4 Lans. 141 (1871).

**Bridges jointly constructed and maintained.** The case of *Matter of Freeholders of Irondequoit*, 68 N. Y. 376 (1877) holding that the law did not provide for the construction at the joint expense of towns of bridges over "bays, lakes, marshes or other bodies of water," is no longer applicable; the joint liability of towns imposed by section 250 extends to bridges over waters of any kind. In order that towns may be jointly liable for the construction of a bridge over a stream forming their boundary, such bridge must connect a lawful highway in each town; but the fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare suitable for travel. *Beckwith v. Whalen*, 70 N. Y. 430 (1877); *People ex rel. Keene v. Supervisors*, 151 N. Y. 190 (1896). Proceedings to compel the repair of a bridge can only be instituted under this section where the bridge crosses a stream dividing the towns. *Matter of Freeholders of Cattaraugus Co.*, 59 N. Y. 316 (1874); *Tiffet v. Alley*, 3 T. & C. 784 (1874).

The Act of 1841 had application only to "bridges over a stream dividing the towns," but in 1857, with a view of rendering the act applicable to every case where a bridge is situated in part in two or more towns, without reference to the question whether the stream divides the towns, or the town line intersects or crosses the stream, and divides the bridge longitudinally, the Legislature amended the section by omitting the words quoted. *Lapham v. Rice*, 55 N. Y. 472 (1874); *Day v. Day*, 94 N. Y. 153 (1883); *Matter of Freeholders of Madrid*, 44 Misc. 431, 90 N. Y. Supp. 110 (1904).

The necessary approaches to a free bridge between two towns are a part of the bridge for the maintenance of which both towns are liable. *Edwards v. Ford*, 22 App. Div. 277, 47 N. Y. Supp. 995 (1897); *Hawxhurst v. Mayor*, 43 Hun, 588 (1887). The section must be construed to authorize the town

superintendent to acquire real estate for the approaches. *Marshall v. Hayward*, 74 App. Div. 27, 77 N. Y. Supp. 57 (1902).

**Powers of town superintendents.** The towns must act through the town superintendents, and there is no authority for employing anybody else, except in the construction of the bridge under contract, not even counsel or representatives of the different towns. *Marshall v. Hayward*, 74 App. Div. 27, 77 N. Y. Supp. 57 (1902). The section is applicable when towns are jointly liable to make or maintain a bridge, but is silent as to when the liability exists. This must be implied by construction with section 47, *ante*, which prescribes the duties of the town superintendent. *Beckwith v. Whalen*, 70 N. Y. 430 (1877).

The town superintendents do not constitute a single body, but each, by mutual agreement, becomes a party to the contract. *Marshall v. Hayward*, 74 App. Div. 27, 77 N. Y. Supp. 57 (1902).

**Liability for defects.** Both towns are responsible for the maintenance of the entire structure, and both are liable, even though the defects causing the injury be at a point on the bridge wholly within one town. *Hawxhurst v. Mayor*, 43 Hun, 588 (1887). As the duty of repairing the bridge is imposed upon the town superintendents of both towns, it necessarily follows that, for damages resulting from neglect to perform that duty, an action lies against both towns jointly. *Shaw v. Town of Potsdam*, 11 App. Div. 508, 42 N. Y. Supp. 779 (1896); *Oakley v. Town of Mamaroneck*, 39 Hun, 448 (1886); *Clapp v. Town of Ellington*, 87 Hun, 542, 34 N. Y. Supp. 283 (1895). Before 1880 (chapter 700) the highway commissioners of the two towns were jointly liable for a defect in a bridge maintained by the towns. *Bryan v. Landon*, 3 Hun, 500 (1875).

Where a bridge built by private enterprise remains a private bridge, the town would not be liable for its defective condition. But if it be adopted by the public and is accepted and recognized as a town bridge by the public authorities, the town superintendent must keep it in repair and the town will be liable for injuries resulting from defects therein. *Heacock v. Sherman*, 14 Wend. 58 (1835); *Dygert v. Schenck*, 23 Wend. 446 (1840); *Town of Clay v. Hart*, 25 Misc. 110, 55 N. Y. Supp. 43 (1898), affirmed 41 App. Div. 625. A town is not liable for defects in a bridge temporarily erected by a town superintendent, acting as a volunteer and not in his official capacity, upon private property to take the place of a public bridge which had been carried out by a freshet. *Ehle v. Town of Minden*, 70 App. Div. 275, 74 N. Y. Supp. 903 (1902).

§ 255. **Refusal to repair.**— If the town board of either of such towns, after notice in writing from the town board of any other of such towns, given by the town clerk thereof, shall not within twenty days give their consent in writing to build or repair any such bridge, and shall not within a reasonable time thereafter direct, by resolution, the same to be done, the town board giving such notice may direct the town superintendent to make or repair such bridge, and then maintain an action in the name of the town,

against the town which neglects or refuses to join in such making or repairing, and in such action, the plaintiffs shall be entitled to recover so much from the defendant, as the town would be liable to contribute to the same, together with costs and interest.

**Derivation.** This section is taken from former Highway Law, section 135, modified so as to authorize the town board, instead of the town superintendent, to enforce by action the repair of a bridge of a town jointly liable therefor.

**For liability of towns for injuries resulting from neglect to keep bridges in repair,** see section 74, *ante*. Towns liable may be proceeded against jointly or severally. *Harris v. Honck*, 57 Barb. 619 (1870).

**When action may be maintained.** An action is not maintainable under this section to recover the amount which the town is liable to contribute toward the construction of a joint bridge unless all the precedent conditions imposed by statute have been complied with. *Flynn v. Hurd*, 118 N. Y. 19 (1889). Such an action may be maintained only where the town sued is liable for a portion of the expense of constructing or maintaining the bridge. *Town of Candor v. Town of Tioga*, 11 App. Div. 502, 42 N. Y. Supp. 911 (1896). In this case it appeared that an iron bridge had been constructed over a stream constituting a boundary line between towns, and the State Engineer had not approved of the manner of its construction and the material thereof, as provided in section 145 of the former Highway Law, and it was held that because of such failure a town could not be charged with the liability to contribute to the construction of the bridge. The mere fact that an agreement has been reached as to payment does not preclude a recovery under this section where one town fails to make the payment as agreed. *Surdam v. Fuller*, 31 Hun, 500 (1884). The complaint need not allege that the defendant town had money with which to pay its share of the joint expense. *Oakley v. Town of Mamaroneck*, 39 Hun, 448 (1886).

**Notice to repair.** If a town board directs the town superintendent to repair a joint bridge, without giving notice to the town boards of the other towns jointly liable, such town board may not maintain an action in the name of the town to recover the proportion of the expense to be borne by the other towns. *Flynn v. Hurd*, 118 N. Y. 19 (1889). A town's refusal to help rebuild the bridge is sufficient evidence of a waiver of the required notice. *Day v. Day*, 94 N. Y. 153 (1883); *Clapp v. Town of Ellington*, 87 Hun, 542, 34 N. Y. Supp. 283 (1895), in which case it was held that a commissioner who had refused to help in the repair of a bridge might be treated as having waived the statutory notice.

A notice to the town board of a town jointly liable for the expense of rebuilding or repairing a bridge and the consent thereof may be in the following form:

#### FORM No. 89.

##### Notice to Town Boards of Adjoining Towns.

To the town board of the town of \_\_\_\_\_, in the county of \_\_\_\_\_:  
*Whereas*, the bridge located on \_\_\_\_\_ highway over the [describe stream] forming the boundary line between the town of \_\_\_\_\_ and the town of \_\_\_\_\_

, has become and is unsafe for public use and travel, in the following respect [state in what respect]; now, therefore,

*You are hereby notified and required* to direct the town superintendent of highways of your town, to join with , the town superintendent of the town of , in the county of , in rebuilding [or making such repairs to] said bridge, and to give your consent in writing to the rebuilding [or repairing] of such bridge within twenty days after the service of this notice, as provided in section 255 of the Highway Law.

Dated this        day of        , 19 .

[Signatures of members of town board.]

#### FORM No. 90.

##### Consent to Rebuild or Repair Bridges.

To the town board of the town of        , in the county of        .

Pursuant to your notice served on us, dated the        day of        , 19        , and to section 255 of the Highway Law, we, the undersigned members of the town board of the town of        , in the county of        , hereby consent to the rebuilding [or repairing] of the [designate the bridge], being the same bridge mentioned in your said notice, and hereby agree to direct        , the town superintendent of highways of the town of        , to join with the town superintendent of highways in your town in rebuilding [or repairing] said bridge.

Dated this        day of        , 19 .

[Signatures of members of town board.]

§ 256. **Proceedings in court.**—Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the town board in each of such towns, to build, rebuild or repair such bridge, and if such town boards refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each supervisor at least eight days before the hearing, may apply to the supreme court at a special term thereof, to be held in the judicial district in which such bridge or any part thereof shall be located, for an order requiring such town boards to direct the town superintendents to build, rebuild or repair such bridge, and the court upon such motion may, in doubtful cases, refer the case to some disinterested person to ascertain the requisite facts in relation thereto, and to report the evidence thereof to the court. Upon the coming in of the report, in case of such reference, or upon or after the hearing of the motion,



in case no reference shall be ordered, the court shall make an order thereon as the justice of the case shall require. If the motion be granted in whole or in part, whereby funds shall be needed to carry the order into effect, such court shall specify the amount of money required for that purpose, and how much thereof shall be raised in each town.

**Derivation.** This section is derived from former Highway Law, section 136, modified so as to provide for an application to the town board rather than the town superintendent.

The application is to be made to the town board of each of the towns liable to construct or repair a bridge over a stream dividing such towns. In case of a refusal to grant the application the applicant may institute proceedings on motion in the Supreme Court at a special term thereof. The supervisor of each town, representing the town board thereof, is to be served with the notice of the motion. The practice on the motion in a special term must conform to the ordinary motion practice in special proceedings brought in that court.

**Levy of tax for amount required.** The court may, upon making an order directing the construction or repair of a bridge in such proceedings, determine the amount required to be expended for such construction or repair. The order should direct that one-half of the expense of such construction and repair be chargeable to each of the towns, to be assessed, levied and collected thereon, as other town charges are assessed, levied and collected. This order should be served upon the supervisor of each of the towns, and it becomes the duty of the supervisor to present the order to the town board. The tax levied is based upon the amount expended by each of the towns for the construction or repair and is to be reported to the board of supervisors by the town superintendent, and such board is required to levy a tax upon the town for its portion of the expense. See section 259.

**Constitutionality.** This section is not unconstitutional by reason of its delegating to the court a power not judicial in its nature; to determine the liability of towns to erect and maintain bridges, to enforce such liability, and to order the mode in which aid shall be performed are acts peculiarly judicial in their character; an analogous appellate jurisdiction in respect to the laying out, altering or discontinuing roads has for a long time been vested in the courts by statute. *Matter of Mt. Morris & Castile*, 41 Hun, 29 (1886).

**Application of section.** In the case of the *Matter of Certain Freeholders* 46 Hun, 620 (1887), it was held that the proceedings provided for in this section could not be instituted where the boundary stream divided a town from a city of the third class. Section 250, *ante* (which was section 130 of Highway Law of 1890, as amended in 1902, chap. 321) provides that a city of the third class shall be regarded as a town for the purpose of the liability for construction of a bridge over such a stream. The law as it now stands renders the proceedings provided for in this section applicable to cities of the third class.

This section provides most effectually for the erection and repair of bridges between towns in every possible contingency, and resort to doubtful remedies

is unnecessary. *Phelps v. Hawley*, 3 Lans. 160 (1870), affirmed 52 N. Y. 23. The proceedings provided for in this section are not inconsistent with those of section 255, *ante*; this act simply giving towns a choice of two remedies in the case to which it applies. *Beckwith v. Whalen*, 65 N. Y. 322 (1875).

The term, "streams dividing such towns," used in this section, was intended to be synonymous with the term "streams upon their boundaries," used in section 250, and the remedy afforded by this section extends to all cases in which liability is imposed by section 250. This section applies to a case where the stream does not run along the line dividing adjoining towns, but traverses such line. *Matter of Freeholders of Town of Madrid*, 44 Misc. 431, 90 N. Y. Supp. 110. (1904). The expression "streams dividing towns" has been held not to include bays, lakes, marshes or other bodies of water not "streams." *Matter of Freeholders of Irondequoit*, 68 N. Y. 376 (1877). Section 250 makes towns jointly liable for the construction and maintenance of bridges "over streams of other waters" upon their boundaries; this change in the law since the above case was decided has modified the rule so that proceedings may be instituted under this section to compel towns to rebuild or repair bridges over waters of any kind constituting boundary lines.

**When proceedings may be instituted.** Proceedings can be instituted under this section only where the bridge is over a stream dividing the towns. *Matter of Freeholders of Cattaraugus Co.*, 59 N. Y. 316 (1874). This section has no application to a bridge upon a stream intersecting the town line at right angles, and intermediate between the exterior lines of a road district. *Tift v. Alley*, 3 T. & C. 784 (1874). Liability to contribute cannot be enforced under this section where the proposed bridge will not connect a lawful highway in each town. *Matter of Freeholders of Montezuma*, 38 N. Y. St. Rep. 970, 14 N. Y. Supp. 845, 80 Hun, 581 (1891).

It is proper to make an application under this section when the adjoining towns refuse to rebuild a bridge over such a stream, although the bridge has been destroyed for eighty years, where there has been no abandonment of a highway. *In re Commissioners of Highways of Glen & Florida*, 3 N. Y. Supp. 461 (1888). In this case it was stated that an order should not be granted where the cost of rebuilding the bridge would be large, and the bridge would be liable to be destroyed by freshets, and but little dissatisfaction existed with the present mode of crossing the stream.

Although there is no refusal on the part of the town to build yet for the reason that they are unable to agree as to the kind of bridge to be built, an application to the court under this section is proper. A case of public inconvenience is thus presented which justifies the application. *Matter of Mt. Morris & Castile*, 41 Hun, 29 (1886).

The following forms will be found useful in instituting the proceedings authorized by this section:

#### FORM No. 91.

##### Petition to Town Boards of Adjoining Towns.

To the Town Board of the Town of \_\_\_\_\_, county of \_\_\_\_\_, and  
the Town Board of the Town of \_\_\_\_\_, county of \_\_\_\_\_:

The petition of the undersigned, A. B.; C. D. and E. F., hereby presented to you as provided in section 256 of the Highway Law, respectfully shows:

That they each of them are freeholders in the town of \_\_\_\_\_, county of \_\_\_\_\_; that the highway bridge known as the [here designate the bridge] which crosses the [name the stream], a stream forming the boundary line between the town of \_\_\_\_\_, in the county of \_\_\_\_\_ and the town of \_\_\_\_\_ in the county of \_\_\_\_\_ has become and is out of repair and is unsafe for public use and travel [state in what respects]; that said bridge has been repaired and maintained at the joint expense of said towns, and said towns are jointly liable to make and maintain a bridge at said point.

Wherefore, we hereby petition and apply to you, the said town boards of said towns, to rebuild [or repair] the bridge at said point.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

A. B.  
C. D.  
E. F.

FORM No. 92.

Notice of Motion for Order Compelling Rebuilding or Repair.

SUPREME COURT — COUNTY OF \_\_\_\_\_

In the Matter  of the  Application of A. B., C. D., and E. F. for an Order Requiring the Town Boards of the Towns of and _____ to rebuild the bridge known as _____ .
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To the Town Board of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and the Town Board of the town of \_\_\_\_\_, in the county of \_\_\_\_\_:

Take notice that an application will be made to this court at a Special Term thereof, to be held at the court house, in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, at the opening of the court on that day, for an order requiring you to direct the town superintendents of such towns to rebuild [or repair] the bridge mentioned in the affidavit hereto attached, and requiring money to be appropriated or raised therefor, and for such other and further relief as to the court may seem just and proper. The application will be made on affidavit and papers, copies of which are herewith served on you.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

A. B.  
C. D.  
E. F.

**FORM No. 93.****Affidavit of Petitioners.**

[Title as in preceding Form.]

STATE OF NEW YORK, }  
 COUNTY OF . } ss.:

A. B., C. D., and E. F., being severally and duly sworn, say that they are freeholders of the town of \_\_\_\_\_, said county, and that said town joins the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and the [name the stream] forms the boundary line between said towns; that at [describe where] a free public bridge has been maintained at the joint expense of said towns, and said towns are jointly liable for the building, rebuilding, repair and maintenance of such bridge at such point; that such bridge is [describe the kind of bridge fully] and has become unsafe and unfit for public use and travel [describe fully the condition the bridge is in], and that in our opinion it would be more for the interests of the said towns to rebuild than to repair said bridge [or as the case may be]; that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the above-named affiants united in a petition to the town boards of the towns of \_\_\_\_\_, pursuant to section 256 of the Highway Law, which petition was duly served on the supervisor of each of said towns, and which requested them to rebuild [or repair] said bridge at said point; that thereafter and on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, said town boards served on us a written refusal as follows: [Here set forth the refusal]; that in our opinion an [iron] bridge should be built, and that the expense should be between \$ \_\_\_\_\_ and \$ \_\_\_\_\_ [approximate the expense as nearly as possible and insert and other facts deemed necessary].

A. B.

C. D.

E. F.

Subscribed and sworn to before me,  
 this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

G. H.,  
*Notary Public.*

**FORM No. 94.****Order of Court Directing Bridge to Be Rebuilt or Repaired.**

At a Special Term of the Supreme Court, held at the court house, in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Present -- Hon. \_\_\_\_\_, Justice.

[Title of case as in Form No. 92.]

On reading and filing the affidavit of A. B., C. D., and E. F., dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, setting forth that [here set forth the substantial facts of the affidavit], with proof of due service of a copy of said affidavit, and notice of motion upon each of the town boards of said towns, and after hearing J. D., of counsel for said applicants, in favor of said motion, and D. B., of counsel [or no one appearing], for the said town boards in opposition thereto,

*It is hereby ordered*, pursuant to section 256 of the Highway Law, that said town boards direct the town superintendents of their respective towns to build

a [or repair] a [here describe the kind of bridge] at [here describe the place], at the joint expense of said towns, not to exceed                      dollars, and that one-half of the said expense shall be chargeable to each of said towns, to be assessed, levied and collected thereon, as other town charges are assessed, levied and collected.

**§ 257. Supervisor to institute proceedings.**— The supervisor of any such town shall, when directed by the town board, institute and prosecute proceedings under this chapter, in the name of the town, to compel the town board of such adjoining town or towns to cause the town superintendents thereof to join in the building, rebuilding or repair of any such bridge, in like manner as freeholders are thereby authorized.

**Derivation.** This section is derived from former Highway Law, section 137, modified so as to authorize the supervisor, when directed by the town board, to institute the proceedings, rather than the town superintendent.

**§ 258. Duty of superintendents.**— The order for building, rebuilding or repairing a bridge being made, and a copy thereof being served on the town superintendent of such adjoining towns respectively the town superintendents of such towns shall forthwith meet and cause such bridge to be built, rebuilt or repaired in accordance with plans and specifications prepared or approved by the district or county superintendent, out of any funds in the hands of the supervisors of such towns applicable thereto; if an inadequate amount of such funds are on hand, the town boards of such towns shall direct the town superintendents thereof to build, rebuild or repair such bridge, and the same shall be done upon credit, or in part for cash or in part upon credit according to the exigency of the case; and such town boards shall direct the superintendents to enter into a contract, to be approved by such town boards, for building, rebuilding or repairing such bridge pledging the credit of each town for the payment of its appropriate share so far as the same shall be upon credit.

**Derivation.** This section is derived from former Highway Law, section 138, modified so as to provide for the preparation or approval of the plans and specifications by the district or county superintendent and requiring the town boards of the several towns to direct the bridge to be built or repaired, and approve contracts therefor.

**Application of section.** This section has been held inapplicable to the city of Auburn in an action brought by a town adjoining the city on the ground that no such power for raising funds is conferred upon that city. *Matter of Certain Freeholders*, 46 Hun, 620 (1887). But section 250 of the present Highway Law provides for the joint liability of a town and a city of the third

class to construct and maintain bridges over boundary lines, and provides that "Except as otherwise provided by law, a city of the third class shall be deemed a town for the purposes of this article."

It is within the contemplation of this section that the court may compel the expenditure of a larger sum than the towns are authorized to raise annually for the ordinary repair of internal highways and bridges. *Matter of Mt. Morris and Castile*, 41 Hun, 29 (1886).

**§ 259. Report of town superintendents, and levy of tax.**— The town superintendent of each town shall make a full and verified report of their proceedings in the premises including an accurate account of what has been done in respect to such bridge, and shall attach thereto a copy of the order granted by the supreme court. Such report, account and order shall be certified by the town board and delivered to the supervisor and be presented by him to the board of supervisors of his county. The board of supervisors at their annual meeting shall levy a tax upon each of such towns, when in the same county, and upon the appropriate towns when in different counties, for its share of the costs of building, rebuilding and repairing such bridge, after deducting all payments actually made by the supervisor upon the written order of the town superintendent. Such tax, including all payments, shall in no case exceed the amount specified in the order of the supreme court.

**Derivation.** This section is derived from former Highway Law, section 139, modified so as to provide for a certification of the report by the town board.

**§ 260. Appeals.**— Either party aggrieved by the granting or refusing to grant such order by the court at special term, may appeal from such decision to the appellate division of the supreme court for the review of the decision. The appellate division may alter, modify or reverse the order, with or without costs.

**Derivation.** This section is derived from former Highway Law, section 140, without change.

**§ 261. Power of court on appeal.**— The special term may grant or refuse costs as upon a motion, including also witnesses' fees, referees' fees and disbursements. The appeal provided for in the last preceding section shall conform to the practice of the supreme court, in case of appeal from an order of a special term to the appellate division.

**Derivation.** This section is derived from former Highway Law, section 141, without change.

**Costs.** The costs here referred to are those upon the motion made by petitioners as provided by section 256 to compel town boards to direct town superintendents to construct or repair a bridge.

§ 262. **Refusal to repair bridges.**— Whenever any such bridge shall have been or shall be so out of repair as to render it unsafe for travelers to pass over the same, or whenever any such bridge shall have fallen down, or been swept away by a freshet or otherwise, if the town superintendent of the adjoining town or towns, after reasonable notice of such condition of the bridge, have neglected or refused, or shall neglect or refuse to repair or rebuild it, then whatever funds have been or shall be necessarily or reasonably laid out or expended in repairing such bridge or in rebuilding the same, by any person or corporation, shall be a charge on such adjoining town or towns, each being liable for its just proportion; and the person or corporation who has made such expenditure, or shall make such expenditures, may apply to the supreme court, at a special term, for an order requiring such towns severally to reimburse such expenditures, which application shall be made upon papers to be served upon the town superintendents of such towns at least eight days prior thereto; and the court may grant an order requiring each adjoining town or towns to pay its just proportion of the expenditure, specifying the same; and the town superintendent of each of such towns shall forthwith serve a copy of such order upon the supervisor of each of their towns, who shall present the same to the board of supervisors, at their next annual meeting. The board of supervisors shall raise the amount charged upon each town by the order, and cause the same to be collected and paid to such persons or corporation as incurred the expenditure. The order shall be appealable.

**Derivation.** This section is derived from former Highway Law, section 142, without change.

**Application of section.** If none of the freeholders or town superintendents of either town institute proceedings to compel the repair of a bridge, then any individual or corporation may repair, and sue for and recover of the towns, the sums expended in so doing. *Phelps v. Hawley*, 3 Lans. 160 (1870); affirmed 52 N. Y. 23.

**ARTICLE X.\*****Ferries.**

Section 270. Licenses.

271. Undertaking.

272. Appendages for rope ferries.

273. Superintendent of public works may lease right of passage.

274. When schedules to be posted.

§ 270. **Licenses.**—The county court in each of the counties of this state or the city court of a city, may grant licenses for keeping ferries in their respective counties and cities, to such persons as the court may deem proper, for a term not exceeding five years. No license shall be granted to a person, other than the owner of the land through which that part of the highway adjoining to the ferry shall run, unless the owner is not a suitable person or shall neglect to apply after being served with eight days' written notice from such person of the time and place at which he will apply for such license, or having obtained such license, shall neglect to comply with the conditions of the license or maintain the ferry. Every license shall be entered in the book of minutes of the court by the clerk; and a certified copy thereof shall be delivered to the person licensed. When the waters over which any ferry may be used shall divide two counties or cities, or a county and city, a license obtained in either of the counties or cities shall be sufficient to authorize transportation of persons, goods, wares and merchandise, to and from either side of such waters.

**Derivation.** This section is derived from former Highway Law, section 170, without change.

**A ferry corporation** may be incorporated under Article VIII of the Transportation Corporation Law. A corporation so incorporated has power to take and exercise a franchise to establish and maintain ferries, subject to the rights of the municipal corporation granting it, or of the owner or owners of any legally existing ferry. *Idem*, § 4.

**The board of supervisors** may make regulations concerning ferries within the county. County Law, § 278.

**Maintenance of ferries.** Section 415 of the Penal Code provides that "A person who:

1. Maintains a ferry for profit or hire upon any of the waters of this State without authority of law; or,

2. Having entered into a recognizance to keep or maintain a ferry, violated the condition of such recognizance; is guilty of a misdemeanor.

Where such ferry is upon waters dividing two counties, the offender may be prosecuted in either county."

\* So in original. This article was inadvertently given a wrong number.



**Power to regulate.** The State and not the Federal government has power to regulate ferries. *People v. Babcock*, 11 Wend. 586 (1834). The county of Niagara may grant licenses to maintain ferries to the middle of the Niagara river, as far as the Canadian line; hence one operating a ferry across that river, without a license, may be prosecuted. *People v. Babcock*, 11 Wend. 586 (1834).

**Written notice** need be given to the owners of the land only, and not to all who claim a right to the ferry nor to those who have obtained a license from another court for a ferry at the same place. *Wiswall v. Wandell*, 3 Barb. Ch. 312 (1848). The application cannot be granted without proof that notice has been given by the applicant to the owner of the land, at least eight days before, of his intention to make such application. *Matter of Talcott*, 31 Hun, 464 (1884).

§ 271. **Undertaking.**— Every person applying for such license shall, before the same is granted, execute and file with the clerk of the court his undertaking with one or more sureties, approved by the court, to the effect that he will attend such ferry with sufficient and safe boats and other implements, and so many men to work the same as shall be necessary during the several hours in each day, and at such rates as the court shall direct.

**Derivation.** This section is derived from former Highway Law, section 171, without change.

§ 272. **Appendages for rope ferries.**— Any person licensed to keep a ferry may, with the written consent of the town superintendent of the town where such ferry may be, erect and maintain within the limits of the highway, at such point as shall be designated in such consent, a post or posts, with all necessary braces and appendages for a rope ferry.

**Derivation.** This section is derived from former Highway Law, section 172, without change.

§ 273. **Superintendent of public works may lease right of passage.**— The superintendent of public works, may, where ferries are now maintained at tide-water, lease the right of passage for foot passengers across state lands adjoining tide-water for a period not exceeding ten years, on such conditions as he may deem advantageous to the state.

**Derivation.** This section is derived from former Highway Law, section 173, without change.

§ 274. **When schedules to be posted.**— Every person licensed to operate or control any ferry in this state, or between this state and any other state, operating from or to a city of fifty thousand inhabitants or over, shall post in a conspicuous and accessible position outside and adjacent to each entrance to such ferry, and in at least four accessible places, in plain view of the passengers upon each of the boats used on such ferry, a schedule plainly printed in the English language of the rates of ferriage charges thereon, and authorized by law to be charged for ferriage over such ferry. If any such person shall fail to comply with the provisions of this section, or shall post a false schedule, he shall forfeit the sum of fifty dollars for each day's neglect or refusal to post such schedule or any of them, to be recovered by any person who shall sue therefor in any court of competent jurisdiction.

**Derivation.** This section is derived from former Highway Law, section 174, as amended by L. 1900, chap. 313, without change.

**Neglect to post schedules.** Penal Code, section 415a, as added by L. 1893, chap. 692, provides as follows: "A person, corporation or association operating any ferry in this State, or between this State and any other State, operating from or to a city of five hundred thousand inhabitants or over, posting a false schedule of ferry rates, or neglecting to post in a conspicuous and accessible place in each of its ferryhouses, in plain view of the passengers, a schedule, plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry, is guilty of a misdemeanor."

## ARTICLE XI.\*

### Miscellaneous Provisions.

- Section 280. Construction or improvement of highways by county and town.  
 281. When commissioners do not act.  
 282. Intemperate drivers not to be engaged.  
 283. Drivers, when to be discharged.  
 284. Leaving horses without being tied.  
 285. Owners of certain carriages liable for acts of drivers.  
 286. Term "carriage" defined.  
 287. Entitled to free use of highways.  
 288. Depositing ashes, stones, sticks, etc., upon the highway.  
 289. Steam traction engines on highways.  
 290. Injuries to highways.  
 291. When town not liable for damages.  
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 294. Injuring fruit or shade trees.  
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\* So in original. This article was inadvertently given a wrong number.

- Section 296. Falling trees to be removed.  
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§ 280. Construction or improvement of highways by county and town.—The board of supervisors of a county may provide for the construction or improvement of a highway or section thereof in one or more towns of the county at the joint expense of the county and town, as provided in this section. The board may, by resolution, direct the district or county superintendent to examine such highway or section thereof, and if the board considers such highway or section thereof to be of sufficient importance to be constructed or improved as provided herein, it shall direct such district or county superintendent to prepare or cause to be prepared maps, plans, specifications\* and estimates therefor. Upon the completion of such preliminary maps, plans, specifications and estimates they shall be submitted to the board of supervisors for approval, and such board may thereupon adopt a resolution providing for the construction or improvement of such highway in accordance with such plans, specifications and estimates. The board of supervisors shall award contracts for the construction or improvement of such highway and the provisions of section one hundred and thirty of this chapter shall apply so far as may be to such contracts. Such contract may be awarded to the town board of any town in which such highway or section thereof is located and the provisions of section one hundred and thirty-one of this chapter shall apply thereto so far as may be. The board of supervisors shall determine the portion of the cost of the construction or improvement of such highway to be borne by the county and the portion to be borne by the town or towns in which such highway is located. The amount so determined to be borne by the county shall be levied and collected as a county charge and paid into the county treasury. The amount to be borne by the town or towns in which the highway is located shall be levied and collected as a town charge and when collected shall be paid into the county treasury. The amount so paid by the town shall not be considered in determining the minimum amount

to be levied and collected in each year for the repair and improvement of highways as provided in section ninety-four of this chapter nor shall such amount be considered in determining the amount to be paid by the state to the town for the repair and improvement of highways therein. The resolution of the board of supervisors providing for the construction or improvement of such highway may authorize the county treasurer of the county or the supervisors of the respective towns to borrow money on the faith and credit of the county or of such towns to pay the portion of the cost of such construction or improvement to be borne respectively by the county or such town or towns. Such resolution may also provide for the issue and sale of such bonds and shall conform so far as may be with the provisions of this chapter relating to a resolution authorizing a town to borrow money for highway purposes.

The construction or improvement authorized by such resolutions shall be done under the supervision and direction of the district or county superintendent. Payments therefor shall be made from time to time by the county treasurer upon the certificate of the district or county superintendent indorsed by the chairman of the board of supervisors. Such highways, when completed and accepted by the board of supervisors, shall be thereafter repaired and maintained at the sole expense of the towns in which they are located, unless the board of supervisors shall apportion a share of the expense thereof upon the county.

**Derivation.** This section is new.

**Time of taking effect.** The provisions of this section relating to the construction or improvement of highways at the joint expense of a county and town take effect on May 19, 1908, pursuant to the provisions of subdivision 3 of section 317 of this act.

**Object of section.** Where a highway is not of such a character as to be included in the system of county highways, or such highway may not be improved as a county highway within a desired period of time, this section permits such highway to be constructed or improved at the joint expense of the county and town. The board of supervisors of a county is to determine whether such highway shall be so constructed or improved. Such construction or improvement does not alter their character as town highways; they will still remain a part of the town system, to be repaired and maintained as are the other town roads of the towns in which they are located, unless the board of supervisors shall apportion a share of the expense thereof upon the county. This section authorizes the court to determine the portion of the costs of the construction or improvement to be borne by the county and town or towns in which the highway is located.

§ 281. **When commissioners do not act.**—When a commissioner or other officer appointed by a court under this chapter shall neglect or be prevented from serving, the courts which appointed him shall appoint another in his place.

**Derivation.** This section is derived from former Highway Law, section 151, without change.

This section applies to the commissioners appointed for the laying out, alteration or discontinuance of a highway, as provided in Article VIII. It also applies to commissioners appointed under section 151 to acquire rights of way for State and county highways, and to any other proceeding authorized by this chapter wherein a court may appoint commissioners.

§ 282. **Intemperate drivers not to be engaged.**—No person owning any carriage for the conveyance of passengers, running or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage who is addicted to drunkenness, or to the excessive use of spirituous liquors; and if any such owner shall violate the provisions of this section, he shall forfeit at the rate of five dollars per day, for all the time during which he shall have kept any such driver in his employment.

**Derivation.** This section is derived from former Highway Law, section 158, without change.

§ 283. **Drivers, when to be discharged.**—If any driver, while actually employed in driving any such carriage, shall be guilty of intoxication, to such a degree as to endanger the safety of the passengers in the carriage, the owner of such carriage shall, on receiving written notice of the fact, signed by any one of said passengers, and certified by him on oath, forthwith discharge such driver from his employment; and every such owner, who shall retain, or have in his service within six months after the receipt of such notice, any driver who shall have been so intoxicated, shall forfeit at the rate of five dollars per day, for all the time during which he shall keep any such driver in his employment after receiving such notice.

**Derivation.** This section is derived from former Highway Law, section 159, without change.

§ 284. **Leaving horses without being tied.**—No driver of any carriage used for the purpose of conveying passengers for hire shall leave the horses attached thereto, while passengers remain in the

same, without first making such horses fast with a sufficient halter, rope or chain, or by placing the lines in the hands of some other person so as to prevent their running; and if any such driver shall offend against the provisions of this section, he shall forfeit the sum of twenty dollars.

**Derivation.** This section is derived from former Highway Law, section 160, without change.

**§ 285. Owners of certain carriages liable for acts of drivers.—**The owners of every carriage running or traveling upon any turnpike, road or highway, for the conveyance of passengers, shall be liable jointly and severally, to the party injured, for all injuries and damages done by any person in the employment of such owners, as a driver, while driving such carriage, whether the act occasioning such injury or damage be wilful or negligent, or otherwise, in the same manner as such driver would be liable.

**Derivation.** This section is derived from former Highway Law, section 161, without change.

At common law the owner was liable for the negligent but not wilful acts of his driver; the statute making the owner liable for wilful acts applies to owners of carriages for conveyance of passengers only. *Wright v. Wilcox*, 19 Wend. 343 (1838); *Mali v. Lord*, 39 N. Y. 381 (1868).

**Street cars.** The conductor or motorman of a street car is not a driver of a carriage within the meaning of this section. *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122 (1871); *Whitaker v. Eighth Ave. R. R. Co.*, 51 N. Y. 295 (1873).

**Automobiles.** Under section 286 the term "carriage" is defined to include automobiles or motor vehicles. Under section 285 a person in the employment of the owner of a passenger automobile as a driver or chauffeur, who, while driving such automobile, causes damages to persons or property, by his negligence, such owner is liable therefor to the same extent and in the same manner as the driver himself would be liable. The section would not be applicable to private automobiles used on the highways for the individual enjoyment of the owners.

**§ 286. Term "carriage" defined.—**The term "carriage" as used in this article shall be construed to include stage coaches, wagons, carts, sleighs, sleds, automobiles or motor vehicles, and every other carriage or vehicle used for the transportation of persons and goods, or either of them, and bicycles, tricycles and all other vehicles propelled by manumotive or pedomotive power, or by electricity, steam, gasoline or other source of energy.

**Derivation.** This section is derived from former Highway Law, section 162, as amended by L. 1901, chap. 531, without change.

**Section applied to a bicycle.** *Rooks v. Houston*, West St. R. R. Co., 10 App. Div. 98, 41 N. Y. Supp. 824 (1896); *Rogers v. City of Binghamton*, 101 App. Div. 352, 92 N. Y. Supp. 179 (1905); *Lechner v. Village of Newark*, 19 Misc. 452, 44 N. Y. Supp. 556 (1896).

§ 287. **Entitled to free use of highways.**— The commissioners, trustees or other authorities having charge or control of any highway, public street, park, parkway, driveway, or place, shall have no power or authority to pass, enforce or maintain any ordinance, rule or regulation by which any person using a bicycle or tricycle shall be excluded or prohibited from the free use of any highway, public street, avenue, roadway, driveway, parkway, park, or place, at any time when the same is open to the free use of persons having and using other pleasure carriages, except upon such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages. But nothing herein shall prevent the passage, enforcement or maintenance of any regulation, ordinance or rule, regulating the use of bicycles or tricycles in highways, public streets, driveways, parks, parkways, and places, or the regulation of the speed of carriages, vehicles or engines, in public parks and upon parkways and driveways in the city of New York, under the exclusive jurisdiction and control of the department of parks of said city, nor prevent any such commissioners, trustees or other authorities in any other city from regulating the speed of any vehicles herein described in such manner as to limit and determine the proper rate of speed with which such vehicle may be propelled nor in such manner as to require, direct or prohibit the use of bells, lamps and other appurtenances nor to prohibit the use of any vehicle upon that part of the highway, street, park, or parkway, commonly known as the footpath or sidewalk.

**Derivation.** This section is derived from former Highway Law, section 163, as amended by L. 1904, chap. 540, without change.

This section applies to the use of bicycles or tricycles in highways, streets and public parks.

**Use of bicycle in highway.** The bicycle, although classed as a vehicle, nevertheless, like the baby carriage, has a sphere of its own. To drive habitually a vehicle drawn by a horse upon the sidewalks of a village or city would create a nuisance without or with the permission of the authorities. But the use of a bicycle on the sidewalk may or may not be a nuisance according to the circumstances. The language of the statute recognizes the absolute rights of the bicycle in the main part of the highway, but it also seems to recognize the peculiar sphere of the bicycle as a vehicle by vest-

ing local authorities with discretionary power to grant the thing which may be prohibited. *Lechner v. Village of Newark*, 19 Misc. 452, 44 N. Y. Supp. 556 (1896). For enforcement of penal provision prohibiting use of bicycle on sidewalk see *People v. Meyer*, 26 Misc. 117, 56 N. Y. Supp. 1097 (1899); *Fuller v. Redding*, 16 Misc. 634, 39 N. Y. Supp. 109 (1896). For power of local authorities to regulate use of bicycle on sidewalks see *People v. Meyer*, 26 Misc. 117, 56 N. Y. Supp. 1097 (1899).

A person riding a bicycle may lawfully ride on the aperture between the rails provided for the cable, commonly called the slot. *Rooke v. Houston*, West St. R. R. Co. 10 App. Div. 98, 41 N. Y. Supp. 824 (1896). New York City park authorities may prohibit use of bicycle on the "Speedway." *Doll v. Devery*, 27 Misc. 149, 57 N. Y. Supp. 767 (1899). An abutting owner, owning the fee of a highway to its center, is not entitled to compensation for the construction of a side path in front of his premises, as a highway is impliedly dedicated to those uses which the public may require in the future, and bicycles have become a public use. A portion of a highway may be set aside for the use of bicycles in the same manner as for the use of pedestrians. *Ryan v. Preston*, 32 Misc. 92, 66 N. Y. Supp. 162 (1900).

**Municipal ordinances** regulating the use of bicycles, tricycles and similar vehicles may be adopted by the town board of a town, or the board of trustees of a village pursuant to L. 1899, chap. 634. Such act is as follows:

*Municipal ordinances.*—§ 1. The municipal officers and boards in the several cities, towns, and villages of this State now having the authority to enact such ordinances, may pass ordinances regulating the use of bicycles, tricycles and similar vehicles on the public highways, streets, avenues, walks, parks and public places within their limits in accordance with the following provisions, and not otherwise.

*Lights.*—1. To require all bicycles, tricycles and similar vehicles when ridden on such public highways, streets, avenues, walks or public places to have attached thereto or carried therewith a light of such illuminating power as to be plainly seen two hundred feet ahead, and kept lighted between one hour after sunset and one hour before sunrise; but this section shall not apply to any rider whose light has become extinguished or who is necessarily absent from his or her home without a light, when going at a pace not exceeding six miles an hour, when an audible signal is given as provided in subdivision two of this section as often as thirty feet are passed over.

*Signals.*—2. To require riders of all such bicycles, tricycles or similar vehicles to give an alarm by bell, whistle or otherwise, which may be heard one hundred feet distant, when about to meet or pass pedestrians and when about to meet or pass other vehicles.

*Rate of speed.*—3. To regulate the rate of speed at which it may be lawful to ride such bicycles, tricycles or similar vehicles; provided however that cyclists shall not be restricted to a rate of speed slower than is allowed any other kind or class of vehicle.

*Coasting and carrying of children; permits for special occasions.*—4. To regulate or prohibit coasting or proceeding by inertia or momentum with the feet off the pedals; the carrying of children under five years of age upon bicycles; the observance by cyclists, of such rules of the road as are established by the highway law; to permit the authorities of such municipality



having charge of the public highways, streets, squares or parks, in their discretion, upon any special occasion, to grant permits to any person or persons to ride such machines during a specified time, upon specified portions of the public streets or highways of such city, town or village, at any rate of speed, and annex such other reasonable conditions to such permits as they shall deem proper; and the said authorities of such municipality may, also, under such conditions as they may deem proper, permit the use of velocipedes and other similar machines by children on any sidewalk in any public way, square, or park in such municipality.

*Riding upon sidewalks.*—5. To regulate or prohibit the riding of any bicycles, tricycles or similar vehicles upon the sidewalks within the limits of any city, town or village; except that no city, town or village shall have any power to prohibit the riding of any bicycles upon any sidewalk within the limits of such city, town or village when said sidewalk shall have been or shall be hereafter constructed solely at the expense of wheelmen or cyclists by and with the consent of the officers having jurisdiction therein, unless the road or street in front of said sidewalk is paved with some smooth and permanent pavement like asphalt or brick, and maintained in a condition suitable for the use of cycles. The term "sidewalk," as used in this act, means any sidewalk laid out as such by any city, town or village, or by the owners of the abutting lands which is reserved, by custom for the use of pedestrians, and which has been especially prepared for their use, but not including foot-paths or portions of public roads lying outside of the thickly settled parts of cities and towns which are worn only by travel, and are not improved by the public authorities, or by the abutting owners.

*Penalties.*—6. To provide that every person violating any such ordinances shall be punished by a fine not exceeding the sum of five dollars for each offense, and in case of the nonpayment of such fine, by imprisonment in the county jail not exceeding one day for each dollar of such fine, in the discretion of the court or magistrate.

*No other ordinances to be made.*—§ 2. No city, town or village, shall have any power to make any ordinance, by-law or regulation respecting the use of bicycles or tricycles except as provided in this act; and except as provided in this act, no ordinance, by-law or regulation heretofore or hereafter made by a city, town or village, in respect to bicycles or tricycles shall have any force or effect. Nothing in this act shall affect the jurisdiction of sidepath commissioners nor the use of sidepaths.

*Security for appearance upon arrest.*—§ 3. Any person arrested for the violation of any of the provisions of this act, or of any ordinance or by-law adopted as provided in this act, may tender at the time of his or her arrest, or at any time before the hearing thereon either five dollars in current money, or his or her bicycle or similar vehicle, as security for his or her appearance in court to make answer to the charge of violating the provisions of this act or any ordinance or by-law adopted as provided in this act; and the officer making the arrest, shall accept the security, which the rider may offer, as aforesaid, for his appearance, before the most convenient court or magistrate, to be specified by said officer at a time to be fixed by him not less than one day, in said city, village or town having jurisdiction of the offense, and such security shall be forthwith delivered, by such officer, to such court or magistrate. In case the person arrested shall fail to appear and answer

to such charge at the time so specified or at such other time to which the matter shall have been adjourned, such security shall be forfeited, and if money, shall be disposed of in the same manner as other fines are disposed of by such court or magistrate, and, if a bicycle or similar vehicle, it may be sold under the direction of such court or magistrate at public sale, a notice of which sale shall be posted in three public places in such city, town or village, and a copy thereof served personally or by mail upon the person who tendered the same at least six days before such sale, and five dollars of the money received upon such sale shall be disposed of in the same manner as other fines collected by such court or magistrate, and the remainder of the money received upon such sale shall be paid to the owner of such bicycle or other similar vehicle on demand.

**§ 288. Depositing ashes, stones, sticks, etc., upon the highway.**— Any person who shall deposit or throw loose stones in the gutter or grass adjoining a highway, or shall deposit or throw upon a highway, ashes, papers, stones, sticks, or other rubbish, shall be liable to a penalty of ten dollars to be sued for and recovered by the town superintendent. No stone or other rubbish shall be drawn to and deposited within the limits of any highway, except for the purpose of filling in a depression or otherwise improving the highway, without the consent and under the direction of the town superintendent.

**Derivation.** The last sentence of this section is derived from former Highway Law, § 165, as added by L. 1898, chap. 352. Subdivision 5 of § 20 of the former Highway Law provides that "Any person who shall deposit or throw loose stones in the gutter or grass adjoining a highway or shall deposit or throw upon a highway ashes, papers, stones, sticks, or other rubbish, to the detriment or injury of the public use of, or travel upon such highway, shall be liable to a penalty of ten dollars."

**Throwing injurious substances in highway.** Penal Code, § 661, provides that "A person who willfully throws, drops or places, or causes to be thrown, dropped or placed upon any road, highway, street or public place, any glass, nails, pieces of metal, or other substance which might wound, disable or injure any animal, is guilty of a misdemeanor."

**§ 289. Steam traction engines on highways.**— The owner of a steam roller, steam traction engine or any other machinery, either propelled or driven by steam, his servant or agent shall not allow, permit or use the same, pass over, through or upon any public highway or street except upon railroad tracks, unless such owner or his agents or servant shall send before the same a person of mature age, at least one-eighth of a mile in advance, who shall notify and warn persons traveling and using such highway or

street with horses or other domestic animals, of the approach thereof, and at night such person shall carry a red light, except in incorporated villages and cities.

**Derivation.** This section is taken from former Highway Law, section 155, as amended by L. 1901, chap. 531, without change.

**Penal provision.** Penal Code, § 640, subd. 11 provides that "A person who willfully:

11. Drives or leads along a public highway a wild and dangerous animal, or a vehicle or engine propelled by steam, except upon a railroad, along a public highway, or cause or direct such animal, vehicle or engine to be so driven, led, or to be made to pass, unless a person of mature age shall precede such animal, vehicle or engine by at least one-eighth of a mile, carrying a red light, if in the night time, and gives warning to all persons whom he meets traveling such highway, of the approach of such animal, vehicle or engine;

Shall be deemed guilty of misdemeanor."

**Purpose and effect of section.** Section is directed against traction engines, and does not include automobiles. *Nason v. West*, 31 Misc. 583, 65 N. Y. Supp. 651 (1900). This section and the provision of the Penal Code (§ 640, subd. 11) making its violation a misdemeanor show that by common consent a steam roller is considered a dangerous thing to be taken through the streets, and emphasizes to whomever does so the necessity of giving such warning as will prevent those driving horses from unexpectedly meeting it. As to whether such warning was given is a question of fact for the jury. *Mullen v. Village of Glens Falls*, 11 App. Div. 275, 42 N. Y. Supp. 113 (1896); *Rice v. Buffalo Steel House Co.*, 17 App. Div. 462, 45 N. Y. Supp. 277 (1897).

The mere presence and use, by a municipal corporation, on one of its public streets, of a steam roller does not render the street defective within the meaning of the statute (*vide* section 74, *ante*). *Mullen v. Village of Glens Falls*, 11 App. Div. 275, 42 N. Y. Supp. 113 (1896).

**Damages for failure to comply.** Where a steam roller is used upon a highway without sending a person ahead to warn travelers of its approach, and the plaintiff's horse is frightened thereby, a verdict for the plaintiff is warranted if there be no contributory negligence on his part. *Buchanan's Sons v. Cranford Co.*, 112 App. Div. 278, 98 App. Div. 378 (1906).

**§ 290. Injuries to highways.**—Whoever shall injure any highway or bridge maintained at the public expense, by obstructing or diverting any creek, water-course or sluice, or by dragging logs or timber on its surface, or by any other act, or shall injure, deface or destroy any mile-stone or guide-post erected on any highway, shall for every such offense forfeit treble damages.

**Derivation.** This section is taken from former Highway Law, section 156, without change.

**Guideposts.** Section 68 of this section (*ante*, p. 95) authorizes the town superintendent, with the consent of the town board, to cause guideposts to be

erected at highway intersections. An injury to mileboard, milestone or guidepost is punishable by imprisonment for not more than two years. See Penal Code, § 639 and notes to § 68, p. 95.

**Penal provisions, relative to injuries to highways.** A public nuisance is a crime against the order and economy of the State and consists in unlawfully doing an act or omitting to perform a duty, which act or omission unlawfully interferes with . . . , a public park, square, street or highway. See Penal Code, § 385. A person, who commits or maintains a public nuisance, the punishment for which is not specially prescribed, or who willfully omits or refuses to perform any legal duty relating to the removal of such a public nuisance, is guilty of a misdemeanor. See Penal Code, § 387.

Penal Code, § 431, provides as follows: "A person who deposits, leaves or keeps, on or near a highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or establishes, maintains or carries on, upon or near a public highway or route of public travel, either on the land or on the water, any business, trade or manufacture which is noisome or detrimental to public health, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months, or both."

A person who willfully or maliciously displaces, removes, injures, or destroys a public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way, is punishable by imprisonment for not more than two years. See Penal Code, § 639.

**Deposit of substance on highway.** Penal Code, § 654a, is as follows: "Whoever, with intent to prevent the free use of a cycle thereon, shall throw, drop or place, or shall cause or procure to be thrown, dropped or placed, in or upon any cycle path, avenue, street, sidewalk, alley, road, highway or public way or place, any glass, tacks, nails, pieces of metal, brier, thorn or other substance which might injure or puncture any tire used on a cycle, or which might wound, disable or injure any person using such cycle, shall be guilty of a misdemeanor and on conviction be fined not less than five nor more than fifty dollars."

**Action for treble damages.** The treble damages are merely cumulative, and may be waived and the single damages sued for. *Dygart v. Schenck*, 23 Wend. 446 (1840). An action for injury to a bridge can only be prosecuted by the town superintendent in the name of the town; it is improper to join him as party plaintiff. *Town of Palatine v. Canajoharie W. S. Co.*, 90 App. 548, 86 N. Y. Supp. 412 (1904). Causes of action under the Railroad Law which requires a railroad "to restore highways to their former state, or to such a state as not unnecessarily to have impaired their usefulness," and under this section to recover treble damages, cannot be united in the same complaint. *Sipperly v. Troy and Boston R. Co.*, 9 How. Pr. 83 (1853).

**Liability to third persons.** The owner of the fee of the highway may dig a ditch across it; all the public can require is that he restore the road to as good condition as it was before. But if such restoration is made by building a bridge over the ditch he must keep the bridge in good condition, and if he fail to do so he is liable if any injury occurs because of it. *Dygart v. Schenck*, 23 Wend. 446 (1840). It is essential that special damages be alleged and proved; and an individual may sue for an obstruction to a public highway where special damages have resulted to him, and where he has ex-

pended money in removing obstructions so that he could travel on the road. *Lansing v. Wiswall*, 5 Den. 213 (1848).

§ 291. **When town not liable for damages.**—No town shall be liable for any damage resulting to person or property by the reason of the breaking of any bridge, sluice or culvert, by transportation on the same of any traction engine, portable piece of machinery, or of any vehicle or load, together weighing eight tons or over, but any owner thereof or other person engaged in transporting or directing the same shall be liable for all damages resulting therefrom.

**Derivation.** This section is derived from former Highway Law, section 154, modified by making a person liable for damages resulting from the breaking of a bridge, sluice or culvert, where the weight of the vehicle load is eight tons, instead of four tons.

**Application of section.** This section does not apply to bridges constructed by a railroad company to restore an appropriated highway to its former state, but only to bridges of a town maintained at public expense. *Bush v. D., L. & W. R. R. Co.*, 166 N. Y. 210 (1901); *Lee v. D., L. & W. R. Co.*, 71 N. Y. Supp. 120 (1901). Section cited to show that a railroad company is required to construct bridges of such strength only as will support vehicles that ordinarily pass over highways. *People ex rel. W. N. Y. & P. R. R. Co. v. Adams*, 88 Hun, 122, 34 N. Y. Supp. 579 (1895).

**Evidence as to weight of load.** In an action against a town, for injury received by a collapse of a bridge, it appeared that a traction engine weighing three and one-half tons was upon the bridge, that it was hauling a thresher weighing about one and one-half tons, and that at the time the accident occurred the engine alone was on the bridge; it was held that evidence may be introduced to show how much was added to the weight of the engine by reason of the effort of the engine to haul the weight of the thresher. *Heib v. Town of Big Flats*, 66 App. Div. 88, 73 N. Y. Supp. 86 (1901). See also *Vandewater v. Town of Wappinger*, 69 App. Div. 325, 74 N. Y. Supp. 699 (1902). A verdict against a town for the death of a driver caused by the breaking of a bridge, will be reversed when it appears that the weight of the wagon and load, as determined by scales which had been repaired six months before the accident and were found to be correct six months after, was over four tons. *Kelly v. Town of Saugerties*, 110 App. Div. 561, 97 N. Y. Supp. 177 (1906).

§ 292. **Law of the road.**—1. Whenever any persons traveling with any carriages, or riding horses or other animals, shall meet on any turnpike road or highway, the persons so meeting shall seasonably turn their carriages, horses, or other animals to the right of the center of the road, so as to permit such carriages, horses, or other animals to pass without interference\* or interruption.

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\* So in original.

2. Any carriage or the rider of a horse or other animal, overtaking another shall pass on the left side of the overtaken carriage, horse or other animal. When requested to do so, the driver or person having charge of any carriage, horse or other animal, traveling, shall, as soon as practicable, turn to the right, so as to allow any overtaking carriage, horse or other animal free passage on his left.

3. In turning corners to the right, carriages, horses or other animals shall keep to the right of the center of the road. In turning corners to the left, they shall pass to the right of the center of intersection of the two roads.

4. Any person neglecting to comply with, or violating any provision of this section shall be liable to a penalty of five dollars to be recovered by the party injured, in addition to all damages caused by such neglect or violation.

**Derivation.** This section is derived from former Highway Law, section 157, as amended by L. 1902, chap. 96, without change.

**Law of the road in general.** The law of the road as declared in this section existed at common law and would continue to exist if the statute were repealed. *Wright v. Fleischman*, 41 Misc. 533, 85 N. Y. Supp. 62 (1903). The rights of the public to the use of the highway are substantially the same whether the fee is in the municipality or in the abutting owners. The public is entitled to an uninterrupted passage, subject only to the temporary obstruction of the highway for a reasonable time in cases of necessity. A right of passage is "the liberty of all citizens to pass and repass on foot, on horseback, and in carriages and wagons." The right also includes the right to drive cattle and horses along the highway. *Elliott on Highways*, p. 316.

In the use of a public highway, a party has a right to expect ordinary prudence from others, and to rely upon that in determining his own use of the road; not to justify his own foolhardiness, but to warrant him to pursue his own business in a convenient manner, where he has no reason to suppose the convenience or safety of others will be prejudiced thereby. *Harpell v. Curtis*, 1 E. D. S. 78 (1850). It is doubtful if the rule applies to one leading a horse. *Mooney v. Trow Directory, Printing and Bookbinding Co.*, 2 Misc. 233, 21 N. Y. Supp. 957 (1893).

Prior to the amendment of 1902 there was no law of the road compelling a horseback rider to turn in any particular direction. See *Dudley v. Bolles*, 24 Wend. 465 (1840); nor a vehicle approaching from the rear to pass to the left *Savage v. Gerstner*, 36 App. Div. 220, 55 N. Y. Supp. 306 (1899). For rule as to passing when going in the same direction, before the amendment of 1902. see *Adolph v. Cen. Park, N. Y. & E. River R. R. Co.*, 76 N. Y. 530 (1879).

**Failure to comply with law of road.** Violation of the law of the road, while evidence of negligence, is not conclusive. The mere fact that a person is on the wrong side will not prevent his recovering damages. The presumption is that a collision is caused by the negligence of the person violating the rule,

but his presence on the wrong side of the road may be explained. *Quinn v. O'Keefe*, 9 App. Div. 68, 41 N. Y. Supp. 116 (1896); *Hoffman v. Union Ferry Co.*, 68 N. Y. 385 (1877). Presumptively a liability is incurred by a person who refuses to obey the statute, to the injury of another who is free from contributory negligence. *Pike v. Bosworth*, 7 N. Y. St. Rep. 665 (1887). Where plaintiff was on the wrong side of the road a valid excuse therefor must appear affirmatively; but the plaintiff's negligence unexplained will not justify any intentional or unnecessary damage by the defendant. *Burdick v. Worrall*, 4 Barb. 596 (1848).

Although this section provides a penalty for failure to observe the law of the road, it does not provide that the defendant is liable for all the damages that may happen while he is on the wrong side. While it may be legal negligence for him to be there, his liability must depend on the rules of law applicable to cases of negligence. *Newman v. Ernst*, 31 N. Y. St. Rep. 1, 10 N. Y. Supp. 310 (1890). Violation of the rules does not deny the defendant the right to set up contributory negligence. *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194 (1845).

The fact that the road was rough and rutty on defendant's side, that he had no design in running against plaintiff's vehicle, and that plaintiff was driving faster than defendant, constitutes no defense unless the road on defendant's side is such as to render it impracticable or extremely difficult for him to turn out. *Earing v. Lansingh*, 7 Wend. 185 (1831). It is no excuse that defendant had no time to turn out, when he was driving fast at night time on the wrong side of the road. *Simmonson v. Stellenmerf*, 1 Edm. Sel. Cas. 194 (1845).

**Right of the center of the highway.** The rule requiring persons meeting to keep their vehicles to the right of the center of the road, does not apply in winter when the depth of the snow renders it impossible or difficult to ascertain the center thereof. It is a reasonable construction of the statute to define the center of the road in such a case, as the center of the traveled track regardless of the worked part of the road. *Smith v. Dygert*, 12 Barb. 613 (1852). The right of the center of the road, as used in this section, means the right of the worked part of the road and not the right of the most traveled part, although the whole of the traveled part may be on one side of the center. *Earing v. Lansingh*, 7 Wend. 185 (1831).

The rule with regard to keeping to the right does not apply when there are obstructions on that side of the highway. *Mooney v. Trow Directory, Printing and Bookbinding Co.*, 2 Misc. 238, 21 N. Y. Supp. 957 (1893). The section applies to the case of vehicles passing each other on the same side of roads and streets so wide that there is no necessity for them to turn to the right of the center line of the highway in order to pass safely. *Wright v. Fleischman*, 41 Misc. 533, 85 N. Y. Supp. 62 (1903).

In approaching the intersection of roads a driver should keep to the right; if he turns to the left, and an automobile coming from behind, in attempting to pass to the left, as required in this section, strikes and injures the horse and wagon, the question as to the liability of the defendant is a question of fact for the jury. *Mendleson v. Van Rensselaer*, 118 App. Div. 516, 103 N. Y. Supp. 577 (1907).

"**Seasonably turn,**" as used in this section, means that travelers shall turn to the right in such season that neither shall be retarded in his progress by

the other occupying his half of the way, when he may have occasion to use it in passing. *Spooner v. Brooklyn, etc. R. R. Co.*, 54 N. Y. 230 (1873).

**Rights of pedestrians.** The law of the road does not apply to persons passing each other on foot on the sidewalk. *Grant v. City of Brooklyn*, 41 Barb. 381 (1864); nor does it apply to a carriage meeting a person on foot in the highway, *Savage v. Gernster*, 36 App. Div. 220, 55 N. Y. Supp. 306 (1899); although there can be no question as to the right of a person to pass along a highway on foot, and he is entitled to the exercise of reasonable care on the part of persons driving along the highway. Vehicles and pedestrians have equal rights in the highway, and both should exercise the care and caution that the circumstances demand.

A person on foot has a right to cross a street, not only at the cross walk, but wherever he pleases; and one driving horses is bound to be watchful at all points so as not to injure persons crossing. *Moebus v. Herrmann*, 108 N. Y. 349 (1888). Footmen or vehicles have no superior rights of way, the one over the other. Each has a right of passage in common, and in its use is bound to exercise reasonable care for his own safety, and to avoid injury to the other. For a person crossing a street on foot, where vehicles are numerous, to fail to look in both directions and ascertain if any vehicles are approaching, their rate of speed and distance from the crossing is negligence. *Barker v. Savage*, 45 N. Y. 191 (1871). A person driving horses along the streets of a city is bound to look out for travelers on foot and must take reasonable care to avoid them. *Murphy v. Orr*, 96 N. Y. 14 (1884); *Hyland v. Yonkers R. R. Co.*, 15 N. Y. St. Rep. 824 (1888).

**Privileged vehicles.** Where by special enactment an exception has been made to the law of the road, the driver of the privileged vehicle (*e. g.* an ambulance) may assume that the drivers of other vehicles will heed his warning and turn out. *Byrne v. Knickerbocker Ice Co.*, 4 N. Y. 531 (1889). So also in the case of fire engines, mail wagons, and police patrol wagons, the public emergency or the necessity of haste is such that the vehicle is entitled to the right of way, free from the impediment of other vehicles.

**Collision; liability.** Plaintiff must use ordinary diligence to avoid the collision. *Center v. Finney*, 17 Barb. 94 (1852). To excuse a collision upon a highway on the ground of inevitable accident, where defendant neglected to turn out it must appear that it could not be avoided by defendant and that no blame be imputed to him. *Center v. Finney*, 17 Barb. 94 (1852).

This section has no application to the meeting of railroad cars with common vehicles in the streets of a city. *Hegan v. Eighth Avenue Railroad Co.*, 15 N. Y. 380 (1857); *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295 (1873); *Barker v. Hudson River R. R. Co.*, 4 Daly, 274 (1872).

**§ 293. Trees; to whom they belong.**—All trees standing or lying on any land within the bounds of any highway, shall be for the proper use of the owner or occupant of such land, except that they may be required to repair the highway or bridges of the town.

**Derivation.** This section is derived from former Highway Law, section 156, without change.



**Shade trees.** Allowances may be made to owners or occupants of abutting lands for setting out shade trees along the highway. Highway Law, § 63, *ante*, p. 91. The town superintendent may authorize the owners of property adjoining the highway to locate and plant trees within the highway. Highway Law, § 61, *ante*, p. 87. The town superintendent has the control of all shade trees in the public highways of the town outside of an incorporated village. Highway Law, § 64, *ante*, p. 92.

**Rights of abutting owners as to trees.** Trees standing on streets and highways, of which the soil belongs to adjacent owners, are the property of such owners, who may remove them at pleasure. Laws passed for the protection of such trees apply only to persons other than the owners; nor can the Legislature authorize the infliction of a penalty upon the owner of the trees for removing them, unless the public has acquired them by purchase or condemnation. The trees within the limits of a highway, when land is taken for that purpose, may be used in repairing the highway and bridges on the presumption that compensation therefor is awarded to the owner as part of his damages for the land. *Village of Lancaster v. Richardson*, 4 Lans. 136 (1871). The public authorities cannot arbitrarily cut down trees within the street boundaries. They are the property of the abutting owners, and he is entitled to maintain them there unless some proper street use required their removal, or they are condemned for public use and paid for. *Ellison v. Allen*, 62 N. Y. St. Rep. 274, 30 N. Y. Supp. 441 (1894).

In addition to the ordinary easements of light, air and access, the landowner may, on a country highway, plant shade trees, cultivate the sides of the road and do anything to improve, beautify it or his own property so long as his acts do not impair the public right of passage. A pole carrying electric wires interferes with and perhaps destroys the legal right of the owner to plant and grow shade trees and to use the side of the road, and makes permanent and exclusive use of the highway; hence, outside of incorporated places at least, such poles cannot be erected in the highway without the consent of the abutting owner. *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522 (1896). Applied to city street where fee is in abutting owners. *Osborne v. Auburn Telephone Co.*, 189 N. Y. 393 (1907), reversing 111 App. Div. 702, 97 N. Y. Supp. 874.

An abutting owner on a city street whose ownership does not extend to the middle of the street, who has set out ornamental shade trees on the sidewalk with the implied sanction of the municipal authorities, has a right in such trees in the nature of an equitable easement, and, where one of them is girdled and destroyed by a horse, may recover from the owner of the horse the damages thus sustained. *Lane v. Lamke*, 53 App. Div. 395, 65 N. Y. Supp. 1090 (1900).

A street railway may not cut down trees belonging to the abutting owner without compensating him therefor. The measure of damages is the difference between the value of the premises before and after the trees are removed, and not the value of the wood; and the plaintiff may recover treble damages under sections 1667-1669 of the Code of Civil Procedure. *McCrudden v. Rochester Railway Co.*, 5 Misc. 59, 25 N. Y. Supp. 114 (1893), affirmed 77 Hun, 609, 28 N. Y. Supp. 1135. The title of the owner, subject only to the easement, remains perfect, not only to the land covered by the highway, but

to all the material within its boundaries, except such as may be needed to build or maintain the road. *Higgins v. Reynolds*, 31 N. Y. 151 (1865); *Gidney v. Earl*, 12 Wend. 98 (1834); *Jackson v. Hathaway*, 15 Johns. 447 (1813); *Cortelyou v. Van Brumdt*, 2 Johns. 357 (1807); *Williams v. Kenney*, 14 Barb. 629 (1853).

§ 294. **Injuring fruit or shade trees.**—It shall be unlawful for any person or persons whatsoever in this state to hitch any horse or other animal to or leave the same standing near enough to injure any fruit or forest tree growing within the bounds of the public highway, or used as a shade or ornamental tree around any schoolhouse, church or public building, or to cut down or mutilate in any way any such ornamental or shade tree; but the right of property owners along the highway to cultivate, train and use such shade trees shall not be impaired or abridged hereby. Any person or persons guilty of violating the provisions of this section shall be deemed guilty of misdemeanor, and shall be punishable by a fine of not less than five dollars, nor more than twenty-five dollars for each such offense, and in case of failure to pay any fine imposed, may be committed to jail, not exceeding one day for each dollar of such fine. Courts of special sessions having jurisdiction to try misdemeanors, as provided by section fifty-six of the code of criminal procedure, shall have exclusive jurisdiction to try offenders in all cases occurring in the same manner as in other cases, where they now have jurisdiction, and subject to the same power of removal, and to render and enforce judgments, to the extent herein provided. All fines collected under the provisions of this act shall be paid when the offense is committed in a town outside of incorporated villages, to the supervisor of the town, to be used as the town board and town superintendent may direct. When the offense is committed in any village of the county, which by law is constituted a separate road district, the fine shall be paid to the treasurer of said village, to be used as the board of trustees may direct.

**Derivation.** This section is derived from L. 1875, chap. 215, §§ 1 and 2, as amended by L. 1881, chap. 344, without change. See notes to preceding section.

§ 295. **Penalty for falling trees.**—If any person shall cut down any tree on land not occupied by him, so that it shall fall into any highway, river or stream, unless by the order and consent of the occupant, the person so offending shall forfeit to such occupant the

sum of one dollar for every tree so fallen, and the like sum for every day the same shall remain in the highway, river or stream.

**Derivation.** This section is derived from former Highway Law, section 102, without change.

**Obstructions** include trees which have been cut or have fallen either on adjacent lands or within the bounds of the highway, in such a manner as to interfere with public travel therein. Highway Law, § 52, *ante*, p. 66. The town superintendent may remove trees which have been cut or have fallen, when they constitute obstructions and the expense thereof is chargeable against the owner of the abutting land. Highway Law, § 55, *ante*, p. 76.

§ 296. **Fallen trees to be removed.**—If any tree shall fall, or be fallen by any person from any inclosed land into any highway, any person may give notice to the occupant of the land from which the tree shall have fallen, to remove the same within two days; if such tree shall not be removed within that time, but shall continue in the highway, the occupant of the land shall forfeit the sum of fifty cents for every day thereafter, until the tree shall be removed.

**Derivation.** This section is derived from former Highway Law, section 103, without change.

**Fallen trees** constituting obstructions may be removed by the town superintendent, and the expense thereof be charged against the abutting owners, as provided in sections 52 and 55, *ante*, p. .

§ 297. **Penalties, how recovered.**—All penalties or forfeitures given in this chapter, and not otherwise specially provided for, shall be recovered by the town superintendent, in the name of the town in which the offense shall be committed; and when recovered, shall be applied by them in improving the highways and bridges in such town.

**Derivation.** This section is derived from former Highway Law, section 164 without change.

**Collection of penalties.** It is made the duty of the town superintendent to collect all penalties prescribed by this chapter, under section 47, subdivision 12 *ante*, p. 59. In the notes under that subdivision reference is made to the several provisions of the Highway Law imposing penalties or forfeitures. The penalties when recovered are to be paid by the town superintendent to the supervisor. See Highway Law, § 104, *ante*, p. 153.

This section does not authorize the superintendents of two towns to unite as plaintiffs and bring an action to recover a penalty or forfeiture for an encroachment upon a highway, *Bradley v. Plair*, 17 Barb. 480 (1854).

The right of the town superintendent to negotiate amicable settlements of controversies relating to encroachments, is incident to their general power of

prosecuting for recovery of penalties incurred because of such encroachments. *Commissioners of Highways of Cortlandville v. Peck*, 5 Hill, 215 (1843).

Actions for recovery of penalties can be brought only in relation to public highways, and not to private roads. *Fowler v. Lansing*, 9 Johns. 349 (1812). In an action under this section a proper reference to the statute under which the suit is brought must be indorsed upon the summons. (Code of Civil Procedure, § 1897). *Hitchman v. Baxter*, 34 Hun, 271 (1884).

**§ 298. Acquisition of plank roads.**—The board of supervisors of any county, except a county wholly within the city of New York, and except the counties of Erie and Essex, may by a vote of a majority of the members thereof, by resolution, determine to acquire the rights and franchises of any individual or corporation, lawfully entitled to exact toll or charge for walking, riding or driving over any plankroad or turnpike, or a bridge within such county, erected over any unnavigable stream, or over the Hudson river above Waterford. Upon the adoption of such resolution, the board of supervisors shall acquire such rights, franchises and property by purchase, if able to agree with the owners thereof, and otherwise by condemnation in the name of the county.

**Derivation.** This section is derived from L. 1899, chap. 594, § 1, in part, as amended by L. 1907, chap. 104. It will be noticed that only the first two sentences of section 1 of the act of 1907 is repealed by this act. The remainder of such section relates to the powers of the stockholders and directors of the plankroad or turnpike corporation.

Upon the dissolution of a turnpike or plankroad corporation such turnpike or road becomes a public highway, with the same effect as if laid out by the town superintendent, and is subject to the laws relating to highways, and the erection, repair and preservation of bridges thereon. Transportation Corporations Law, § 148 *post*. The board of supervisors may provide for the use of abandoned turnpike and plankroads within a town, as public highways. County Law, § 80, *post*.

Turnpike and plankroad corporations are incorporated pursuant to section 120 of the Transportation Corporations Law, and have the powers prescribed by the other sections of article nine of that law.

**§ 299. Borrowing money; bonds.**—The board of supervisors of such county may borrow money for the acquisition of such rights, franchises, and property, and may issue the bonds or other evidences of indebtedness of the county therefor, but such bonds or other evidences of indebtedness shall not bear a rate of interest exceeding five per centum per annum and shall not run for a longer period than twenty years and shall not be sold for less than par.

**Derivation.** This section is derived from L. 1899, chap. 594, § 2, without change.

§ 300. **Raising money to pay bonds and interest.**—Except in the counties of Rensselaer, Onondaga, Albany and Columbia, the amount of such bonds in whole or in part together with the interest thereon may be apportioned by the boards of supervisors upon the towns, cities and villages constituting separate highway districts, in which such plankroad, turnpike or bridge is located, in such proportions as the boards may deem just and the amount so apportioned to each municipality for the payment of the principal and interest of such bonds shall be annually levied and collected at the same time and in the same manner as money for other county charges. In the counties of Rensselaer and Columbia, the boards of supervisors, in making up the annual tax budget of the counties, shall each year levy and assess upon and against the taxable property in said counties, in addition to the amounts levied and assessed for other county charges, an amount sufficient to pay the interest falling due and payable on the said bonds during such year, and also an amount sufficient to pay the proportion of the years fixed at the time during which said bonds shall run from their issue to maturity. The amount raised by tax in each year for the payment of the principal of said bonds shall be preserved intact by the county treasurers of said counties until said bonds mature and are payable, and upon the maturity of said bonds, said county treasurer shall pay the same in full out of the moneys so raised by annual tax therefor and shall thereupon take back said bonds with receipts for the payment thereof and deliver them to the boards of supervisors of said counties for cancellation. Said county treasurer shall deposit at interest the said moneys yearly raised by tax for payment of the principal of said bonds in such bank or depository as shall be designated by the boards of supervisors of said counties, and the amount realized from the interest thereon shall be used for the purposes of the said counties under the direction of the said boards of supervisors.

**Derivation.** This section is derived from L. 1899, chap. 594, § 3, as amended by L. 1905, chap. 120, without change.

§ 301. **Roads so acquired to be part of highway system.**—A plankroad, turnpike or bridge acquired pursuant to this article shall become a part of a highway system of such county and of the towns, cities and villages in which the same is located, and shall thereafter be repaired and maintained in the same manner as the other highways or bridges therein.

**Derivation.** This section is derived from L. 1899, chap. 594, § 4, without change.

§ 302. **When road is in two or more counties.**—When a plank-road, turnpike, toll road or bridge is partly in one county and partly in another, the boards of supervisors of the said counties shall act together in the manner prescribed above, and determine the amount to be paid to said plankroad, turnpike, toll road or bridge company, by each county, and such amount against each county, after such determination, shall be paid by each county.

**Derivation.** This section is derived from L. 1899, chap. 594, § 5, without change.

§ 303. **Albany post road; railroad tracks thereon.**—The old established road along the valley of the Hudson river from the city of New York to the city of Albany, known as the Albany post road, shall be a public highway for the use of the traveling public forever. The said highway shall be kept open and free to all travelers, and shall not be obstructed in any way by any obstacle to free travel. No trustees of any village or corporation of any city upon its route, or town superintendents of highways of towns, or any other person or board whatever, shall have any power or authority to authorize or license the laying of any railroad track upon said highway, except to cross the same, and any such action shall be void and of no effect. This section shall not apply to any portion of said road within the city of New York, nor shall it apply to the road of the president, directors and company of the Rensselaer and Columbia turnpike, nor to the town of Cortlandt or the village of Sing Sing, in Westchester county.

**Derivation.** This section is derived from L. 1896, chap. 423, §§ 1-3 and 4, as amended by L. 1900, chap. 576, without change.

**Power of local officers over New York and Albany post road.** The power conferred upon town officers by colonial laws and State statutes, prior to the enactment of the above statute, to alter and improve the New York and Albany post road is not restricted or taken away by this section and the only limitation contained therein applies to the construction of railroad tracks upon the highway. Nor has the power conferred upon such town officers by colonial laws and former State statutes been affected by the provisions of section 77 of the County Law, providing that the board of supervisors of any county may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein. *People ex rel. Dinsmore v. Vandewater*, 176 N. Y. 500, reversing 83 App. Div. 54, 82 N. Y. Supp. 627 (1903).

## ARTICLE XII.

**Saving Clause; Laws Repealed; When to Take Effect.**

Section 310. Transfer of powers and duties of state engineer.

311. Transfer of records; eligibility of present employees.

312. County engineers and superintendents of highways to be continued in office.

313. Pending actions or proceedings.

314. Saving clause.

315. County highway maps preserved.

316. Construction.

317. When to take effect.

318. Laws repealed.

§ 310. **Transfer of powers and duties of state engineer.**— On and after the taking effect of this chapter, and the appointment and qualification of the state commission as herein authorized, all the powers and duties of the state engineer in respect to highways and bridges, conferred and imposed by any statute of this state, shall be transferred to the department of highways to be exercised and performed by the state commission of highways as provided herein.

**Derivation.** This section is new.

The object of this section is to transfer to the State Commission, when appointed, all the powers and duties of the State Engineer imposed upon him by any State statute, relating to the highways and bridges thereon. Until the commission has been appointed and has qualified as provided in article two, the State Engineer is to continue in the exercise of his powers and duties in respect to highways, imposed or conferred either by the provisions of this law which are in effect at the time or by any other State statute.

§ 311. **Transfer of records; eligibility of present employees.**— The state engineer shall transfer and deliver to the state commission of highways all contracts, books maps, plans, papers and records of whatever description, in his possession when such commission is appointed and have qualified, pertaining to the construction, improvement, maintenance and supervision of highways and bridges and such commission is authorized at such time to take possession of all such contracts, books, maps, plans, papers and records. The commission may also retain in its employment resident and other engineers, levelers, rodmen, clerks and employees engaged or connected with the department of highways

in the office of the state engineer, or employed by him in connection with the powers and duties exercised and performed by him in respect to highways and bridges, and all such engineers, clerks and employees shall be eligible to transfer and appointment to positions under the commission.

**Derivation.** This section is new.

The officers and employees of the State Engineer, whose duties pertain to highways, who are in the office of the State Engineer when this act takes effect, are eligible to transfer and appointment in the office of the commission.

§ 312. **County engineers and superintendents of highways to be continued in office.**— County engineers and superintendents of highways in office when this chapter takes effect shall be continued in office during their present term of office and until the district or county superintendents shall have been appointed and have qualified as provided in this chapter. Such county engineers and superintendents of highways shall exercise the powers and perform the duties hereby conferred and imposed upon district or county superintendents until the appointment and qualification of a district or county superintendent as above provided. Upon the appointment and qualification of a district or county superintendent for the county for which such county engineer or superintendent of highways is appointed all contracts, books, maps, plans, papers, and records pertaining to the construction, improvement, maintenance and supervision of highways in such county shall be transferred to such district or county superintendent.

**Derivation.** This section is new.

§ 313. **Pending actions or proceedings.**—This chapter shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways and bridges, brought by or against the state engineer, or county engineer or a county superintendent of highways, or a commissioner of highways, under the provisions of any statute hereby repealed, but the same may be prosecuted or defended in the same manner by the commission or by the officer having jurisdiction in respect thereto. Any investigation, examination or proceeding undertaken, commenced or instituted by the state engineer, county engineer or highway commissioner



or either of them relating to highways or bridges may be conducted or continued to a final determination by the proper officer hereunder, in the same manner, and under the same terms and conditions, and with the same effect as though this chapter had not been passed.

**Derivation.** This section is new.

§ 314. **Saving clause.**—The repeal of a law, or any part of it specified in the annexed schedule shall not affect or impair any contract, or any act done, or right accruing, accrued or acquired or any penalty, forfeiture, or punishment incurred prior to the time when this chapter or any section thereof takes effect, under or by virtue of the laws so repealed, but the same may be asserted, enforced, prosecuted, or inflicted, as fully and to the same extent, as if such laws had not been repealed. The provisions of this chapter shall not affect or impair any act done or right accruing, accrued or acquired under or in pursuance of any resolution adopted by the board of supervisors of a county, on or before the thirty-first day of December, nineteen hundred and eight, requesting the construction or improvement of a highway therein, as provided in chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof, or under or in pursuance of any resolution adopted on or before such date by a board of supervisors, under such act and the acts amendatory thereof, providing for the construction or improvement of a highway in a county in accordance with maps, plans and specifications submitted to such board by the state engineer, or under or in pursuance of any contract for the construction or improvement of a highway, awarded as provided in such chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight, and the acts amendatory thereof. All further proceedings in respect to such highway shall be taken in accordance with the provisions of this chapter.

**Derivation.** Provision similar to this was inserted in section 201 of the former Highway Law and was therefore retained in this chapter.

§ 315. **County highway maps preserved.**—The county highways to be selected by the commission for construction or improvement, as provided in this chapter, shall be the highways in the respective counties designated upon the map of the highways of the state, prepared by the state engineer as provided by law, and approved by the legislature by chapter seven hundred and fifteen

of the laws of nineteen hundred and seven; except the highways on such map which have been designated and described as state highways by section one hundred and twenty of this chapter. Such map shall remain in full force and effect notwithstanding the repeal of such chapter seven hundred and fifteen of the laws of nineteen hundred and seven by this chapter; except that the board of supervisors of any county is hereby authorized to modify the designation of county highways on such map by resolution duly adopted by a majority vote of the members of such board, provided the total mileage as originally designated upon the county map in such county is not thereby materially increased. A certified copy of such resolution shall be transmitted to the commission, or to the state engineer if the same be adopted prior to the appointment and qualifications of the commission.

**Derivation.** This section is new.

**Time of taking effect.** This section takes effect on May 19, 1908, pursuant to subdivision 3 of section 317.

The board of supervisors of any county is authorized by this section to adopt a resolution modifying the designation of a county highway on the map prepared by the State Engineer as provided by law and approved by the Legislature by chapter 715 of the Laws of 1907. The State commission will be controlled by the map as so prepared in making its selection of county highways to be constructed or improved. If any change is desired in such map by adding highways thereto or eliminating highways therefrom, the board of supervisors must first take action by adopting a resolution modifying the map to conform to local conditions.

§ 316. **Construction.**—Wherever the term state engineer shall occur in any law, contract or document such term shall be deemed to refer to the state commission of highways as established by this chapter so far as such law, contract or document pertains to matters which are within the jurisdiction of such commission of highways. Wherever the term county engineer or county superintendent of highways is used in any such law, contract or document such term shall be deemed to refer to and include the county or district superintendent having jurisdiction of the matter contained in such law, contract or document.

The provisions of this chapter so far as they are substantially the same as those existing at the time they shall take effect, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this chapter, and not as new enactments. References in laws not repealed to provisions of law incorporated in this chapter and repealed, shall be construed as applying to the provisions so incorporated.

**Derivation.** This section is derived from former Highway Law, section 202.

§ 317. **When to take effect.**— This chapter shall take effect the first day of January, nineteen hundred and nine, except as to the provisions specified as follows:

1. The provisions of sections forty-three, ninety, ninety-one, ninety-four, ninety-five, ninety-nine, and one hundred, relating to highway commissioners, estimates of expenditures, duties of town board in respect thereto, levy of taxes, the limitation of amounts to be raised, submission of propositions at town meetings, assessments of village property and statements by the clerk of the board of supervisors to the comptroller, shall take effect immediately.

2. The provisions of sections one hundred and thirty and one hundred and thirty-one of this chapter, pertaining to the award of contracts for the construction of county highways shall take effect immediately and shall apply to contracts to be awarded under chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and the acts amendatory thereof, prior to January first, nineteen hundred and nine; and until the commission shall have been appointed and have duly qualified, the state engineer and surveyor shall exercise the powers and perform the duties conferred upon the said commission by the foregoing sections.

3. The provisions of section one hundred and seventy-nine, relating to the sprinkling of state and county highways and the removal of refuse therefrom; the provisions of section two hundred and eighty, relating to the construction or improvement of highways at the joint expense of a county and town, and the provisions of section three hundred and fifteen relating to the modification of maps by boards of supervisors and the provisions of this section shall take effect immediately.

**Derivation.** This section is new.

**Time of taking effect.** This entire section takes effect May 19, 1908, the object being to make certain the taking effect of the sections mentioned in the several subdivisions on such date.

§ 318. **Laws repealed.**— Of the laws enumerated by the schedule hereto annexed that portion specified in the last column is hereby repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.

## SCHEDULE OF LAWS REPEALED.

Revised Statutes....	Part I, chapter 16, titles 1, 2....	All.
Revised Statutes....	Part I, chapter 20, title 13.....	All.
Laws of	Chapter.	Sections.
1797.....	43.....	All
1797.....	63.....	2
1797.....	64.....	All
1798.....	35.....	1-9, 11-16
1801.....	186.....	1-27, 30, 32, 34, 40, 41
1802.....	32.....	All
1802.....	75.....	All
1803.....	14.....	All
1804.....	49.....	All
1807.....	50.....	All
1808.....	205.....	1-5, 7
1810.....	163.....	2, 3
1811.....	97.....	All
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1817.....	43.....	All
1817.....	83.....	All
1819.....	127.....	1
1820.....	227.....	All
1821.....	128.....	All
1821.....	183.....	All
1823.....	262.....	62
1826.....	45.....	5
1826.....	198.....	All
1826.....	222.....	All
1827.....	224.....	All
1828.....	21.....	1 139, 147, 156, 223, 279, 311, 325, 331, 398, 476, 478, 512.
1830.....	56.....	107
1832.....	107.....	All
1832.....	274.....	All
1833.....	149.....	All
1834.....	267.....	All
1835.....	154.....	All
1836.....	122.....	All
1836.....	281.....	All

Laws of	Chapter.	Sections.
1837.....	431.....	All
1840.....	300.....	All
1841.....	225.....	All
1845.....	70.....	7-10
1845.....	180.....	5-14
1846.....	324.....	9
1847.....	455.....	2-12, 15, 18-23, 25-27
1848.....	77.....	All
1853.....	63.....	All
1853.....	135.....	All
1853.....	174.....	All
1854.....	324.....	All
1855.....	255.....	All
1857.....	383.....	All
1857.....	491.....	All
1857.....	615.....	All
1857.....	639.....	All
1858.....	51.....	All
1858.....	103.....	All
1859.....	373.....	All
1860.....	61.....	All
1860.....	468.....	All
1861.....	30.....	All
1861.....	311.....	All
1862.....	220.....	10, pt.
1862.....	243.....	All
1863.....	93.....	All
1863.....	444.....	All
1864.....	395.....	All
1865.....	442.....	All
1865.....	522.....	1-5, 7
1866.....	180.....	All
1866.....	770.....	All
1868.....	791.....	All
1868.....	843.....	All
1869.....	24.....	All
1869.....	131.....	All
1869.....	322.....	All
1869.....	593.....	All
1870.....	125.....	All
1870.....	311.....	All
1870.....	461.....	All

Laws of	Chapter.	Sections.
1870.....	595.....	All
1871.....	171.....	All
1871.....	245.....	All
1872.....	274.....	1
1872.....	315.....	All
1872.....	519.....	All
1873.....	63.....	All
1873.....	69.....	All
1873.....	315.....	All
1873.....	395.....	All
1873.....	448.....	All
1873.....	477.....	All
1873.....	773.....	All
1874.....	169.....	All
1874.....	446.....	Tit. 3, § 11, pt. exempting of- ficers of lunatic asylums from highway assessments.
1874.....	570.....	All
1874.....	613.....	All
1875.....	22.....	All
1875.....	196.....	All
1875.....	215.....	All
1875.....	341.....	All
1875.....	431.....	All
1876.....	271.....	All
1876.....	340.....	All
1876.....	348.....	All
1877.....	197.....	All
1877.....	344.....	All
1877.....	465.....	All
1878.....	44.....	All
1878.....	49.....	All
1878.....	114.....	All
1878.....	245.....	All
1878.....	377.....	All
1879.....	31.....	All
1879.....	67.....	All
1880.....	114.....	All
1880.....	305.....	All
1880.....	308.....	All
1880.....	503.....	All

Laws of	Chapter.	Sections.
1881.....	233.....	All
1881.....	344.....	All
1881.....	513.....	All
1881.....	644.....	All
1881.....	696.....	All
1881.....	700.....	All
1883.....	99.....	All
1883.....	196.....	All
1883.....	254.....	All
1883.....	346.....	All
1883.....	371.....	All
1883.....	398.....	All
1884.....	220.....	All
1884.....	251.....	All
1884.....	344.....	All
1884.....	359.....	All
1884.....	396.....	All
1884.....	479.....	All
1885.....	267.....	11
1886.....	269.....	All
1886.....	291.....	All
1886.....	344.....	All
1886.....	422.....	All
1886.....	452.....	All
1887.....	471.....	All
1887.....	526.....	All
1887.....	604.....	All
1887.....	704.....	All
1888.....	240.....	All
1888.....	260.....	All
1888.....	428.....	All
1889.....	120.....	All
1889.....	146.....	All
1889.....	259.....	All
1890.....	210.....	All
1890.....	268.....	All
1890.....	291.....	All
1890.....	493.....	All
1890.....	558.....	All
1890.....	568.....	All
1891.....	192.....	All
1891.....	212.....	All

Laws of	Chapter.	Sections
1891.....	309.....	All
1892.....	493.....	All
1893.....	333.....	All
1893.....	412.....	All
1893.....	419.....	All
1893.....	468.....	All
1893.....	582.....	All
1893.....	607.....	All
1893.....	655.....	All
1894.....	334.....	All
1894.....	727.....	All
1895.....	181.....	All
1895.....	330.....	All
1895.....	375.....	All
1895.....	386.....	All
1895.....	411.....	All
1895.....	416.....	All
1895.....	508.....	All
1895.....	579.....	All
1895.....	586.....	All
1895.....	606.....	All
1895.....	611.....	All
1895.....	716.....	All
1895.....	717.....	All
1896.....	423.....	All
1896.....	464.....	All
1896.....	973.....	All
1896.....	987.....	All
1897.....	204.....	All
1897.....	227.....	All
1897.....	286.....	All
1897.....	334.....	All
1897.....	344.....	All
1897.....	782.....	All
1898.....	106.....	All
1898.....	115.....	All
1898.....	127.....	All
1898.....	155.....	All
1898.....	350.....	All
1898.....	351.....	All
1898.....	352.....	All
1898.....	353.....	All



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Laws of	Chapter.	Sections.
1898.....	641.....	All
1899.....	78.....	All
1899.....	84.....	All
1899.....	92.....	All
1899.....	152.....	All
1899.....	232.....	All
1899.....	285.....	All
1899.....	344.....	All
1899.....	345.....	All
1899.....	594.....	All
1899.....	622.....	All
1899.....	681.....	All
1899.....	703.....	All
1900.....	25.....	All
1900.....	153.....	All
1900.....	293.....	All
1900.....	300.....	All
1900.....	313.....	All
1900.....	399.....	All
1900.....	516.....	All
1900.....	576.....	All
1900.....	640.....	All
1901.....	35.....	All
1901.....	54.....	All
1901.....	60.....	All
1901.....	109.....	All
1901.....	125.....	All
1901.....	129.....	All
1901.....	150.....	All
1901.....	162.....	All
1901.....	168.....	All
1901.....	239.....	All
1901.....	240.....	All
1901.....	437.....	All
1901.....	441.....	All
1901.....	464.....	All
1901.....	531.....	All
1902.....	52.....	All
1902.....	53.....	All
1902.....	75.....	All

Laws of	Chapter.	Sections.
1902.....	96.....	All
1902.....	105.....	All
1902.....	129.....	All
1902.....	156.....	All
1902.....	166.....	All
1902.....	242.....	All
1902.....	258.....	All
1902.....	305.....	All
1902.....	331.....	All
1902.....	323.....	All
1902.....	321.....	All
1902.....	379.....	All
1902.....	396.....	All
1902.....	510.....	All
1903.....	4.....	All
1903.....	27.....	All
1903.....	57.....	3, 4
1903.....	136.....	All
1903.....	172.....	All
1903.....	228.....	All
1903.....	269.....	All
1903.....	460.....	All
1903.....	610.....	All
1903.....	625.....	All
1903.....	643.....	All
1904.....	51.....	All
1904.....	109.....	All
1904.....	111.....	All
1904.....	153.....	All
1904.....	183.....	All
1904.....	192.....	All
1904.....	297.....	All
1904.....	298.....	All
1904.....	299.....	All
1904.....	324.....	All
1904.....	342.....	All
1904.....	353.....	All
1904.....	387.....	All
1904.....	426.....	All
1904.....	443.....	All
1904.....	456.....	All

Laws of	Chapter.	Sections.
1904.....	478.....	All
1904.....	495.....	All
1904.....	536.....	All
1904.....	540.....	All
1904.....	608.....	All
1904.....	609.....	All
1904.....	611.....	All
1904.....	612.....	All
1904.....	646.....	All
1904.....	688.....	All
1905.....	108.....	All
1905.....	120.....	All
1905.....	293.....	All
1905.....	417.....	All
1905.....	605.....	All
1905.....	672.....	All
1906.....	67.....	All
1906.....	101.....	All
1906.....	149.....	All
1906.....	265.....	All
1906.....	311.....	All
1906.....	363.....	All
1906.....	423.....	All
1906.....	468.....	All
1906.....	530.....	All
1907.....	50.....	All
1907.....	104.....	1, first two sentences.
1907.....	128.....	All
1907.....	191.....	All
1907.....	246.....	All
1907.....	270.....	All
1907.....	382.....	All
1907.....	404.....	All
1907.....	453.....	All
1907.....	648.....	All
1907.....	715.....	All
1907.....	716.....	All
1907.....	717.....	All
1907.....	719.....	All
1907.....	743.....	All

## STATE BONDS FOR IMPROVEMENT OF HIGHWAYS.

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L. 1906, chap. 469 — "An act to provide for issuing of bonds of the state for the improvement of highways, and making appropriation therefor."

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§ 1. There shall be issued in the manner and at the times hereinafter provided, bonds of the state pursuant to the provisions of section twelve of article seven of the constitution, which bonds shall be sold by the state and the proceeds thereof paid into the state treasury, and so much thereof, as may by law be appropriated from time to time, shall be expended for the improvement of highways in the manner provided by chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and acts amendatory thereof. Such bonds shall be known as bonds for the improvement of highways, shall be exempt from taxation, and shall declare that they are issued pursuant to said provisions of the constitution and pursuant to this act. [As amended by L. 1907, chap. 718.]

§ 2. The comptroller is hereby authorized and directed to cause such bonds of the state to be prepared and may make a separate contract for engraving the plates for such bonds and printing such bonds therefrom with such person, firm or corporation as he may deem to be for the best interest of the state. The principal and interest of said bonds shall be payable as they become due at the transfer office in the city of New York designated by the commissioners of the canal funds for the issue and transfer of bonds for canal improvement. No bond issued either originally or upon a transfer or to supply the loss of a bond shall be valid unless it shall be signed by the comptroller of the state, sealed with his seal of office and countersigned by an officer designated for such purpose at such transfer office. [As amended by L. 1907, chap. 718.]

§ 3. [Repealed by L. 1907, chap. 718.]

§ 3. The bonds shall be sold in such lot or lots as in the judgment of the comptroller may be required for the purpose of making partial or final payment for the improvement of highways, but the amount of such bonds shall not exceed the aggregate amount authorized for such purpose. They shall be of such denomination as the comptroller may determine, and run for a period of fifty years, and any or all of such bonds shall bear interest at either three, three and one-half or four per centum per annum as in the judgment of the comptroller may be necessary to effect a sale of said bonds and shall be sold for not less than par. The comptroller shall sell said bonds to the highest bidder after advertisement for a period of twenty days, Sundays and holidays excepted, in at least two newspapers printed in the city of New York and one in the city of Albany. Such advertisement shall provide that the comptroller may in his discretion reject any or all bids, and in the event of such rejection the comptroller may readvertise in the same manner as

many times as in his judgment may be necessary to effect a satisfactory sale. The bonds shall be issued in coupon or registered form at the option of the purchaser. Registered bonds may be issued in exchange for coupon bonds upon request of the owner of said bonds but coupon bonds shall not be issued in exchange for registered bonds. There is hereby imposed upon the real and personal property subject to taxation in this state, an annual tax of two cents for each one dollar of bonds issued under the provisions of this act and outstanding, to provide a sinking fund to redeem said bonds at maturity, and in like manner, a tax of four cents for each one dollar of bonds issued and outstanding which bear interest at the rate of four per centum per annum to provide for the payment of interest upon said bonds; a tax of three and one-half cents for each one dollar of bonds issued and outstanding which bear interest at the rate of three and one-half per centum per annum to provide for the payment of interest upon such bonds and a tax of three cents for each one dollar of bonds issued and outstanding which bear interest at the rate of three per centum per annum to provide for the payment of interest upon such bonds. The amount of such tax shall be annually computed by the comptroller and shall be assessed, levied and collected in each of such years in the manner prescribed by law for the assessment, levy and collection of state taxes and shall be paid by the several county treasurers into the treasury of the state at the times and in the manner prescribed by law for the payment of state taxes to the state treasurer and the proceeds of such taxes after paying the interest due upon such outstanding bonds shall be invested by the comptroller in securities in which he is authorized by law to invest the trust and sinking funds of the state. Such sinking fund shall be used solely for the purpose of paying the principal on the bonds issued in accordance with the provisions of this act, provided, however, that in case the legislature shall hereafter in any fiscal year appropriate out of funds in the treasury moneys to provide a sum equal to the amount which would otherwise have been raised by taxation as hereinbefore provided in such fiscal year for such sinking fund and interest on such bonds, no direct state tax for such year shall be imposed or collected as above provided, and provided also that when the payments to the sinking fund of premiums upon bonds sold, interest upon investments made from the sinking fund and the moneys received from the towns and counties as and for their share of the cost of highways improved with funds made available under the provisions of this act, shall amount to a sum equal to the amount of any annual tax herein required to be levied to provide payment of the interest upon bonds outstanding and the annual payment to the sinking fund, then the comptroller shall make a special recommendation to the legislature asking that the legislature shall direct that so much of the said accumulation as may be sufficient to pay the interest due in that year and provide the amount due to the sinking fund shall be used for such purposes and that no state tax shall be levied for that year as herein provided. [Renumbered and amended by L. 1907, chap. 718.]

§ 4. Whenever the improvement of a highway or section thereof under a contract shall be completed and final payment therefor shall have been made the state engineer shall prepare a statement of the cost of such improvement

including engineering expenses, inspection and all charges and expenses properly chargeable thereto, showing in detail the date of each payment, and the purpose and amount of such payment. Such payments shall be grouped as far as practicable by dates and the total thus obtained shall be deemed the cost of such improvement, and a certified copy of said statement shall be filed by the state engineer in the office of the comptroller. If a highway or section thereof so improved shall be situate in two or more towns or in two or more counties, the state engineer shall apportion such expense to such towns and counties according to the cost of such improvement in each of such towns or counties. Such statement when audited and approved by the comptroller shall be filed in his office and shall be final, and a duplicate thereof shall be filed with the county treasurer of each county wherein the highway or section thereof has been improved. If the board of supervisors of any county shall have theretofore provided funds to pay two per centum of the cost of such improved highway as thus determined, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said county for each mile of public highway within such county to be ascertained and determined by dividing the total assessed valuation of taxable property in said county as equalized for state purposes by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, and if the board of supervisors of any county shall have theretofore provided funds to pay, on behalf of any town, one per centum of the cost of such improved highway as thus determined, for each one thousand dollars of assessed valuation of real or personal property liable to taxation in said town for each mile of public highway within said town to be ascertained and determined by adding to or deducting from the total assessed value of taxable property in said town as equalized for county purposes, the percentage of value, if any, added or deducted by the state board of equalization to equalize between counties for state purposes, and dividing the sum thus obtained by the total mileage of public highways in said town, exclusive of the streets and highways within any incorporated city or village in said town, but not exceeding thirty-five per centum of the cost for the county and fifteen per centum of the cost for the town or towns, as shown by such statement, it shall be the duty of the county treasurer to pay the amount thereof upon the requisition of the state engineer as provided in section nine of chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and the acts amendatory thereof and thereafter the county and town shall be deemed to be fully discharged of its obligation to the state on account of the construction of such improved highway, except the obligation to pay their proportionate amount of the state tax for the state's share of the cost of construction. If such payment shall not be so made, the comptroller shall subsequent to October first and prior to November first of each year, charge to each of such counties an amount equal to two per centum of the sinking fund required to provide payment for the bonds issued under the provisions of this act to provide the funds to improve such highway, and two per centum of the interest, for each one thousand dollars of assessed valuation of real and

personal property liable to taxation in said county for each mile of public highway in said county, to be ascertained and determined by dividing the total assessed valuation of taxable property in said county, as equalized for state purposes, by the total mileage of highways in said county, exclusive of the streets and highways within any incorporated city or village in said county, and to each town in like manner, an amount equal to one per centum of the sinking fund required to provide payment for the bonds issued under the provisions of this act to provide the funds to improve such highway, and one per centum of the interest, for each one thousand dollars of assessed valuation of real and personal property liable to taxation in said town for each mile of public highway within said town, to be ascertained and determined by adding to, or deducting from, the total assessed value of taxable property in said town as equalized for county purposes, the percentage of value, if any, added or deducted by the state board of equalization to equalize between counties for state purposes, and dividing the sum thus obtained by the total mileage of public highways in said town, exclusive of the streets and highways within any incorporated city or village in said town, but no county shall be charged more than thirty-five per centum of such sinking fund and thirty-five per centum of such interest, and no town shall be charged more than fifteen per centum of such sinking fund and interest. The comptroller shall notify each board of supervisors of such counties of the amounts so charged and the amounts of such sinking fund and interest so charged shall be included by the board of supervisors in their next annual tax levy as county and town charges. The tax so levied on account of the said county and town charges, when collected, shall be paid to the county treasurer and be by him paid over to the state treasurer at the times and in the manner prescribed by law for the payment of state taxes to the state treasurer, and shall be used for paying interest due upon bonds and creating a sinking fund as hereinbefore provided. The mileage of highways to be used in determining the amounts to be charged to a county or town under this section shall be the tables of mileage prepared by the state engineer, which said tables shall be filed with the state comptroller. [Renumbered and amended by L. 1907, chap. 718.]

§ 5. The sum of five million dollars is hereby appropriated, payable out of the moneys realized from the sale of bonds as provided by this act for the improvement of highways in the manner prescribed by chapter one hundred and fifteen of the laws of eighteen hundred and ninety-eight and acts amendatory thereof, and the remaining part, if any, of the five million dollars not heretofore realized from the sale of bonds as provided in such section of such act for the improvement of highways shall be subject to the provisions of this act as now amended and shall be sold in accordance with the provisions of this act. [Renumbered and amended by L. 1907, chap. 718.]

## CHAPTER II.

### Duties of Board of Supervisors Relating to Highways and Bridges.

(County Law, 1892, chap. 686, Art. IV.)

- Section 60. Limitation of article.
61. County highways and bridges.
  62. Location and construction of bridges.
  63. County aid to towns for the construction and repair of bridges.
  64. Construction by county of destroyed bridges.
  65. Apportionment of expenses, when a bridge is intersected by town or county lines.
  66. County's share of expenses, to be raised and paid to commissioners of highways of towns.
  67. May authorize a town to construct a bridge outside of a boundary line.
  68. Bridges over county lines.
  69. Authorizing towns to borrow money.
  - 69a. Authorize towns to purchase toll roads or toll bridges.
  70. The raising and expenditures of moneys.
  71. Streets outside of city limits.
  72. Survey and records of highways.
  73. Regulations of toll rates.
  74. Highways in counties of more than 300,000 acres of unimproved land.
  75. Appropriation of certain non-resident highway taxes.
  76. Balance of state appropriations.
  77. Alteration of state roads.
  78. Further powers.
  79. Powers as to tires on vehicles.
  80. Use of abandoned turnpike, plank or macadamized roads.
  81. Definition of "upon its borders."

§ 60. **Limitation of article.**— This article shall not apply to bridges on the Hudson river below Waterford, or on the East river, or over the waters forming a part of the boundaries of the state.

Constitution, Art. III, § 18, provides that no local law shall be passed providing for the construction of bridges, except on the Hudson river below Waterford.



§ 61. **County highways and bridges.**—A board of supervisors shall, on the application of twenty-five resident tax-payers, when satisfied that it is for the interest of the county, lay out, open, alter, or discontinue a county highway therein, or cause the same to be done, and construct, repair, or abandon a county bridge therein, or cause the same to be done, when the board shall deem the authority conferred on commissioners of highways insufficient for that purpose, or that the interests of the county will be promoted thereby. All expenses so incurred shall be a county charge. Such powers shall not be exercised unless the applicants therefor shall prove to the board the service of a written notice, personally or by mail, on a commissioner of highways of each town in the county, at least twelve days prior to the presentation of such application, specifying therein the object thereof; and when the application is to lay out a highway, or construct a bridge, the route or location thereof; and in all other cases, a designation of the highway or bridge to be affected thereby.

**Object and effect of section.** This section authorizes the board of supervisors to lay out, open or alter a county highway, and construct, repair or abandon a county bridge upon the application of twenty-five resident taxpayers. So far as the section applies to the opening and construction of county highways it is not now of much use. There has been such an extensive development of the present system of highways, constructed at the joint expense of State, county and town, since its enactment, that it has now outlived its usefulness. The Highway Law of 1908 has provided so fully for the construction of all important highways that the probability of action under it is now exceedingly remote. But wherever a road has been constructed under this or any other statute, the board of supervisors may direct its abandonment or alteration as provided in this section. So far as such section is applicable to bridges it remains in full force and effect.

The common-law liability for the proper repair of bridges rested upon the county, where no private person or other body was specifically charged with the duty to repair. But this common-law rule was never adopted in this State. The general system which has always existed here has made the towns primarily liable for the maintenance of highways and bridges. *Hill v. Board of Supervisors*, 12 N. Y. 52 (1854); *People ex rel. Root v. Board of Supervisors*, 146 N. Y. 107 (1895); *People ex rel. Keene v. Board of Supervisors*, 142 N. Y. 271 (1894).

**Bridges.** The county is not liable for failure of supervisor to maintain bridges in a safe condition. *Ahern v. County of Kings*, 89 Hun, 148, 34 N. Y. Supp. 1023 (1895); *Godfrey v. County of Queens*, 89 Hun, 18, 34 N. Y. Supp. 1052 (1895).

Joint liability of town and county to pay for construction and maintenance of bridges over streams on boundary lines of county is prescribed by Highway Law, § 250, *ante*, p. 314. The county's share is raised by tax upon the

entire county and paid to the supervisor to be applied by him on the order of the town superintendent toward the payment of the expense of the construction and maintenance. Highway Law, § 251, *ante*, p. 315.

§ 62. **Location and construction of bridges.**—The board may authorize the location, change of location and construction of any bridge, applied for by any town, or towns, jointly, or by other than a municipal corporation, created under a general law, or by any corporation or individual for private purposes; and if a public bridge, erected other than by a municipal corporation, establish the rates of toll for crossing such bridge; but if such bridge is to cross a navigable stream, provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw, to prevent any obstruction of the navigation of such stream; and if a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. When such bridge shall be intersected by the line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction herein permitted. But this section shall not apply to a pier bridge erected or to be erected over the Mohawk river above the state dam by a corporation organized under the transportation corporations law, provided such corporation shall comply with all the provisions of said transportation corporations law applicable thereto; such a corporation, without further proceeding, shall have the right to erect and maintain piers in said river for the purposes of such a bridge. [*Amended by L. 1898, ch. 225.*]

**Construction of bridges by county.** At common law bridges were to be maintained at the expense of the county. *Wrought-Iron Bridge Co. v. Attica*, 49 Hun, 513, 2 N. Y. Supp. 359, affirmed 119 N. Y. 204 (1890); *Hill v. Supervisors of Livingston*, 12 N. Y. 52 (1854). Under the statute as it existed prior to the passage of the Highway Law of 1890 counties could not be compelled to contribute to the maintenance of bridges. *Town of Wirt v. Supervisors*, 90 Hun, 205, 35 N. Y. Supp. 887 (1895).

When the general interests of the county demand it, the board of supervisors has the power to act in respect to bridges. *Huggans v. Riley*, 125 N. Y. 88 (1890). In executing the power the board may exercise their sound discretion. *People v. Meach*, 14 Abb. (N. S.) 429 (1870).

**Power as to location.** This section does not deprive a town superintendent of the power to erect a new bridge when necessary to connect the two portions of a highway intersected by a stream. The power conferred upon the board is not exclusive and does not prevent the construction of a bridge at a point selected by the town board of a town, after power has been conferred

upon the town by the board of supervisors to borrow money therefor. *Huggams v. Riley*, 125 N. Y. 88 (1890).

Private person owning lands on both sides of a river may, without legislative authority, and even in defiance of legislative prohibition, maintain a bridge for his own use, provided he does not interfere with the public easement. Such owner cannot, however, without legislative authority, maintain a bridge for public use. *Chenango Bridge Co. v. Paige*, 83 N. Y. 178 (1880). And see *People ex rel. Howell v. Jessup*, 160 N. Y. 249 (1899).

Rates of toll for use of bridge may be regulated by board of supervisors. See County Law, § 73, and Transportation Corporations Law, § 136, *post*, p.

§ 63. County aid to towns for the construction and repair of bridges.—If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money, not exceeding two thousand dollars in any one year, to be raised by the county and paid to such town to aid in defraying such expenses.

**Aid to town.** In this State as early as 1784 (L. 1784, chap. 52), the construction and maintenance of bridges was committed to towns. It very soon became apparent that requiring the towns to bear the entire expense of constructing bridges imposed, in some instances, an undue burden, and as early as 1801, an act was passed giving to the boards of supervisors the power of assisting towns unreasonably burdened by the erection or repair of bridges. *People ex rel. Root v. Supervisors of Steuben County*, 81 Hun, 216, 30 N. Y. Supp. 729, affirmed 146 N. Y. 107 (1895). As to liability of county to contribute in aid of towns, see *Hill v. Supervisors of Livingston*, 12 N. Y. 52 (1854); *People v. Supervisors of Dutchess*, 1 Hill, 50 (1841); *Phelps v. Hawley*, 52 N. Y. 27 (1873). A board of supervisors may aid a town unreasonably burdened by the construction of bridges, although the town has already bonded itself for such purpose. The money so appropriated may be expended for the payment of the town bonds. *Knowles v. Supervisors of Chemung County*, 112 App. Div. 138, 97 N. Y. Supp. 1111 (1906).

§ 64. Construction by county of destroyed bridges.—If any bridge within a county, or intersected by any boundary line of a county, shall be destroyed by the elements, and the board of supervisors of the county shall deem that the expenses of the construction of a new bridge at or near the site of the bridge so destroyed would be too burdensome upon the town or towns within such county, which would otherwise be liable therefor, the board of supervisors of any such county may provide for the construction and completion of a bridge and all necessary approaches thereto, at or near the site of the bridge so destroyed. If the bridge so destroyed shall have been constructed by a cor-

poration created under a general law, and the site thereof, and of the approaches thereto, or either, shall be the property of such corporation, such board of supervisors may purchase the interest of such corporation, or any other person, in such site or approaches, if such purchase can be accomplished upon reasonable terms; but if such site or approaches can not be lawfully acquired by such purchase, or otherwise, upon reasonable terms, such board may acquire title to premises on either side of such site, and provide for the construction of a bridge and approaches thereto, at such place, at the expense of the county, or of the two counties jointly, as the case may be, provided such bridge shall be so located as not to increase the distance to be traveled upon the highway to reach each end of such bridge more than five rods. Any board of supervisors providing for the construction of any such bridge may determine by resolution whether the expenses of the maintenance and repair thereof shall thereafter be a county charge, or a charge upon such town or towns.

The limitation of \$2,000 imposed by the preceding section does not apply where the bridge was destroyed by the elements.

County is liable for at least one-sixth the cost of the construction and maintenance of a bridge over a stream constituting the boundary line of the county. Highway Law, §§ 250, 251, *ante*, p. 314. This duty of the county to contribute may be enforced by mandamus. *People ex rel. Keene v. Supervisors*, 142 N. Y. 271 (1894).

**Acquisition of toll-bridges.** It is provided by Highway Law, §§ 298-302, that the board of supervisors of a county may acquire the rights and franchises of a toll-bridge, and purchase any bridge for the use of which a toll is exacted. The above section is for the purpose of enabling the board of supervisors to reconstruct a toll-bridge which has been destroyed, and for such purpose the board may acquire the site of the bridge destroyed.

§ 65. **Apportionment of expenses when a bridge is intersected by town or county lines.**—If any public free bridge, intersected by the boundary line of a county, shall also be intersected by the boundary line of two or more towns in such county, the board of supervisors of such county shall apportion as it shall deem equitable, between such towns, their respective shares of the expenses of the construction, maintenance and repair of such bridge, and the amount to be received by each town, of the money raised by the county to be paid toward defraying the expenses of constructing and repairing such bridge.

Bridges over streams constituting boundary lines of a county are to be constructed and maintained at the joint expense of the town and county, the

county being absolutely liable for at least one-sixth of the cost of such construction and maintenance. See Highway Law, § 250, *ante*, p. 314. Under this section if a bridge crosses a stream which is not only the boundary line of a county but is also the boundary line of two or more towns therein, the board of supervisors is required to apportion among the towns that part of the cost of such construction or maintenance which is not borne by the county itself. It is provided in section 97 of the Highway Law that the board of supervisors may, when application is made for authority to issue bonds for the construction of a bridge, apportion the cost of such construction among the towns liable to pay therefor.

**Apportionment of cost.** Under the law as it existed prior to the enactment of the above section in 1892, the board of supervisors was authorized to apportion the cost of the construction and maintenance of a bridge over a county boundary line which also constituted a boundary line between two or more towns. Under the former law it was held that the power of apportionment vested in the board was permissible merely and could not be compelled. *Surdam v. Fuller*, 31 Hun, 500 (1884). The supervisors may apportion the expense of the construction among the towns on their own motion. *People ex rel. Morrill v. Sunpervisors* 112 N. Y. 585 (1889).

The board of supervisors may compel the erection of a bridge by towns and apportion the expense thereof upon them notwithstanding the fact that one of the towns is opposed to the erection of the bridge. *Town of Kirkwood v Newbury*, 122 N. Y. 571 (1890).

**§ 66. County's share of expenses to be raised and paid to the commissioners of highways of the towns.**—The board of supervisors shall cause to be raised and collected the amount to be paid by the county to any town toward the expenses of a bridge and when collected the same shall be paid to the commissioners of highways of the town, to be applied by them toward the payment of such expenses.

This section is probably superseded by section 251 of the Highway Law which provides that "The board of supervisors shall levy upon the taxable property of the county a sum sufficient to pay its proportion of such expense, and the same when collected shall be paid to the supervisor of such town to be applied by him on the order of the town superintendent after audit as provided in this chapter, toward the payment of such expenses." The supervisor is made the custodian of all moneys raised by tax or otherwise for the construction and maintenance of highways and bridges. See Highway Law, § 104. It therefore follows that the moneys raised by the county under the above section must be paid to the supervisor rather than the town superintendent.

**§ 67. May authorize a town to construct a bridge outside of a boundary line.**—The board of supervisors of any county may authorize any town, on a vote of a majority of the electors thereof voting at a regular town meeting, to appropriate a sum, or pledge

its credit, to aid in, or wholly construct and maintain a bridge outside the boundaries of the town or county, or from or within the boundary line of any town into another town or county, but forming a continuation of highways leading from such town or county, and deemed necessary for the public convenience.

§ 68. **Bridges over county lines.**—The board shall provide for the care, maintenance, preservation and repair of any draw or other bridge intersecting the boundary line of counties or towns, and which bridge is by law a joint charge on such counties or towns, or on the towns in which it is situated; and to severally apportion, as it may deem equitable, the expenses thereof on the towns respectively liable therefor, or on the respective counties when liable; but when such bridge shall span any portion of the navigable tide-waters of this state, forming, at the point of crossing, the boundary line between two counties, such expense shall be a joint and equal charge upon the two counties in which the bridge is situated, and the board of supervisors in each of such counties shall apportion such expense among the several towns and cities in their respective counties, or upon any or either of such towns and cities, as in their judgment may seem proper; and if there be in either of said counties, a city, the boundaries of which are the same as the boundaries of the county, then it shall be the duty of the common council of such city, to perform the duty hereby imposed upon the boards of supervisors; but no town or city not immediately adjacent to such waters, at the points spanned by said bridge shall be liable for a larger proportion of such expense than the taxable property of such town or city bears to the whole amount of taxable property of such county. The board of supervisors of such counties or in any city embracing the entire county, and having no board of supervisors, the common council shall have full control of such bridges. No such bridge shall be constructed unless the board of supervisors in each of such counties, and the common council of the city whose boundaries are the same as the boundary of the other county adjacent to such waters, shall first by resolution determine that such bridge is necessary for public convenience, in which case such common council, with the consent of the mayor, may authorize the issue of bonds for the purpose of constructing such bridge, to be issued as other bonds are issued in said city. Whenever any bridge now spanning any such navigable tide-waters or hereafter erected across any such navigable tide-

waters, shall be condemned by the United States authorities as an obstruction to navigation, and shall be ordered removed, the county and city authorities having charge of such bridge, if they shall determine that such bridge shall be rebuilt, shall, as soon as practicable after such determination, cause plans to be prepared for the erection of the new bridge and the removal of any bridge so condemned as aforesaid, and within a reasonable time after the approval of any such plans by the United States authorities, the proper officers shall proceed with the construction of said new bridge. In case of any unreasonable delay on the part of the officer or officers charged with the duty of construction of such new bridge, such duty may be enforced by mandamus upon the application of any citizen interested in its performance. [*Amended by L. 1896, ch. 995.*]

**Joint liability of towns.** Section 250 of the Highway Law provides that when "bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses." This joint liability is absolute and may be compelled by one town against another under the provisions of sections 254-262 of the Highway Law. The above section of the County Law permits the board of supervisors to direct as to the care, maintenance, preservation and repair of bridges over town or county boundary lines, and also permits such boards to apportion the expense thereof upon the several towns liable.

**A liability of the county to construct bridges over a dividing stream** only exists where there is a lawful highway which would be connected by, and which becomes a part of such highway. *People ex rel. Keene v. Supervisors*, 151 N. Y. 190 (1896); *Beckwith v. Whalen*, 70 N. Y. 430 (1877). Where a bridge crosses navigable tide waters between two counties the expense of constructing the bridge should be equally apportioned between the counties; and mandamus will lie to compel boards of supervisors in such a case to keep the bridge in repair. *People ex rel. Keene v. Supervisors*, 142 N. Y. 271 (1894). It was held in this case, however, that the court could not control the board's discretion in determining the particular form and manner in which the bridge should be constructed or maintained.

**Liability of county for defects.** A county is not liable for injuries caused by defects in bridges constructed and maintained under the direction of town officers. It has even been held that a county is not liable for defects in a bridge over tidal waters between two counties, which was constructed and is maintained wholly at the expense of the counties. *Markey v. County of Queens*, 154 N. Y. 675 (1898). In this case the court said: "A public bridge is a public highway. Its maintenance is quite as much a governmental duty toward the public within the territory of the State, and the principle that the State holds its highways in trust for the public is applicable. This is especially true where a bridge is necessary to cross the navigable waters of the State; but it is true under all circumstances. \* \* \* To charge the

duty of building and maintaining a bridge over navigable waters upon the boards of supervisors of counties, was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit and in its exercise they acted as the agents for the public at large. The State, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway and its performance might properly be delegated to the officers of the particular civil division. The corporate body of Queens county derived no special advantage from it in its corporate capacity and, if that be true, it should not be liable for the negligent acts of the board of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be as exempt from a private action as would be the State itself."

§ 69. **Authorize towns to borrow money.**—The board may upon the application of any town, liable or to be made liable to taxation, in whole or in part, for constructing, building, repairing or discontinuing any highway or bridge therein, or upon its borders, pursuant to a vote of a majority of the electors of such town at a biennial town meeting or special town meeting, called for that purpose, taken pursuant to sections thirty, thirty-one and thirty-two of the town law; or upon the written request of the commissioners of highways and town board of such town or towns, and said vote of a majority of said electors, in a case arising under section ten of the highway law, where the highway or bridge has not been already repaired or rebuilt, authorize such town or towns to construct, build, repair or discontinue such highway or bridge and to authorize said town or towns to borrow such sums of money therefor, for and on the credit of such town or towns as may be necessary according to a written estimate in items of the fair cost and expense thereof. Said board may also on the application of any town or towns, authorize them to borrow such sums of money, for or on the credit of such town or towns, as may be necessary to pay any debt, lawfully incurred by or on behalf of such town or towns. The board may, upon the application of any town, pursuant to a vote of a majority of the electors of such town at a biennial town meeting or special town meeting, called for that purpose, taken pursuant to sections thirty, thirty-one and thirty-two of the town law, authorize such town to build, construct and repair a public dock or bulkhead within its boundaries and to borrow such sums of money for and on the credit of such town as may be necessary for such purpose. In a case arising under section ten of the highway law, where the highway or bridge has been actually built or repaired, the application shall be accom-



panied by the certificate and audit provided by sections eleven and twelve of the highway law. In all other cases the application shall be accompanied by the certificate of the town board of the subject, occasion and amount of the indebtedness, and, as far as practicable, with the items, vouchers and audits thereof. If such highway or bridge shall be situated in two or more towns in the same county, the board shall apportion the expense among such towns in such proportion as shall be just. If said town or towns contain any portion of the lands of the forest preserve, said board shall not authorize said town or towns, to borrow any such moneys without the written approval of the forest, fish and game commission, except to pay a debt of the town incurred in good faith pursuant to section ten of the highway law. [*Amended by L. 1907, ch. 81.*]

**Present application.** So much of this section which pertains to the borrowing of money by towns for the construction, maintenance and repairing of highways and bridges and the issuing of bonds therefor, has been superseded by section 97 of the Highway Law.

**§ 69-a. Authorize towns to purchase roads or toll bridges.**—The board may authorize a town or towns to purchase for public use, any plank road, turnpike, toll road or toll bridge in such town, and may authorize the company owning the same, to sell the same, or any part thereof, or the franchise thereof, and to authorize such town or towns to borrow such sums of money as may be necessary therefor for or on the credit of such towns, after the same shall have been directed by a vote of a majority of the electors at a town meeting, or special town meeting as provided in section sixty-nine. [*Added by L. 1903, ch. 469.*]

**Tollroads and bridges.** This section is for the purpose of enabling a town or towns to purchase for public use a plankroad, turnpike, tollroad or toll-bridge. The rights and franchises of turnpike, plankroad or bridge companies may be acquired by the board of supervisors for the use of the county, and county bonds may be issued in payment thereof, as provided in Highway Law, §§ 298-302. The bonds issued by a county for such acquisition may be apportioned by the board of supervisors upon the towns, cities and villages constituting separate highway districts in which such plankroad, turnpike or bridge is located. See Highway Law, § 300.

**§ 70. The raising and expenditure of moneys.**—The board shall, from time to time, impose upon the taxable property of such towns sufficient tax to pay such obligations as they shall become

due. The supervisor and town clerk shall each keep a record, showing the date and amount of the obligations issued, the time and place of their payment, and the rate of interest thereon. The obligations shall be delivered to the supervisor of the town, who shall dispose of the same for not less than par, and pay the proceeds thereof to the commissioners of highways of the town, or to such other officer as shall be designated by the board of supervisors, to be used by them for the purposes for which the same were appropriated; but not more than five hundred dollars of such proceeds shall be expended upon any highway or bridge, except in pursuance of a contract made by a contractor with the commissioners of highways of the town, or other officer designated by the board of supervisors, and approved by the town board, no member of which shall be interested therein. If such highway or bridge shall be wholly or partly within the limits of an incorporated village, the consent of a majority of the trustees of such village shall be necessary for the action of the board of supervisors as herein provided.

This section is in effect superseded by section 98 of the Highway Law.

§ 71. **Streets outside of city limits.**— When any territory in a county containing an incorporated city of one hundred thousand inhabitants, excepting the towns of Flatbush and New Lots in the county of Kings, has been mapped into streets and avenues pursuant to law, the board of supervisors may authorize the establishment of a plan for the grade of such streets and avenues, laying out, opening, grading, constructing, closing and change of line of any one or more of them, and provide for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, and for the levy, collection and payment of the amount of damages sustained and the charges and expenses incurred, or which may be necessary to incur in carrying out such provisions, but such last named power in regard to laying out, opening, grading, constructing and change of line, of such streets or avenues or defraying the expenses thereof, shall only be exercised on the petition of the property owners, who own more than one-half of the frontage on any such street or avenue, or on a certificate of the town board and commissioners of highways of the town, that the same is, in their judgment, proper and necessary for the public interest. If the streets and avenues, in respect to which such action is proposed to be taken, shall lie

in two or more towns, a like certificate shall be required of the town board and commissioners of highways of each town. Before making such certificate, such town board, or boards and commissioners of highways, shall give ten days' notice by publication in one of the daily papers of the county, and by conspicuously posting in six public places in each of such towns, of the time and place at which they will meet to consider the same, at which meeting the public, and all persons interested, may appear and be heard in relation thereto. No such street or avenue shall be laid out, opened or constructed, upon or across any lands acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by a corporation formed for the purpose of improving the breed of horses, without the consent of such corporations. No town officer shall charge any thing for his services under this section, nor shall any charge be made against any such town or the property therein, for the expense of the publication of the notice herein required.

**Power of boards of supervisors over streets.** Boards of supervisors are vested with legislative discretion to lay out and construct streets outside of city limits in certain counties. The control over the whole subject, legislative discretion as to the incidences and details, and the mode of accomplishing the purposes sought, are in the broadest and most general way conferred upon the board of supervisors. *Hubbard v. Sadler*, 104 N. Y. 223 (1887). The cost of improvement may be levied upon property within the area which, in the opinion of the board, is benefited. *Matter of Church*, 92 N. Y. 1 (1883).

The above section was derived from L. 1875, chap. 482, § 1, subd. 9. This subdivision was amended by L. 1892, chap. 289. The amendatory act being passed at the same session of the Legislature as the County Law, it is still in force notwithstanding the repeal of the act amended thereby and may be held to supersede the above section of the County Law. See Statutory Construction Law, § 31.

Subdivision 9 of § 1 of L. 1875, chap. 482, as amended by L. 1892, chap. 289, reads as follows: "To authorize in any county containing an incorporated city of one hundred thousand inhabitants or upward, when any territory within such county and beyond the limits of such city has been mapped out into streets and avenues in pursuance of law; the establishment of a plan for the grades of such streets and avenues; the alteration of such plan of grades, or of any plan thereof which shall have been established by law; the laying out, opening, grading, construction, closing and change of line, or of the width of any or more of such streets and avenues, or any part or parts thereof, and of the courtyards, sidewalks and roadways; to provide for the estimation and award of the damages to be sustained, and for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, the levying, collection and payment of the amount of such damages, and of all other charges and expenses to be incurred, or which

may be necessary in carrying out the provisions of this subdivision; the laying down of new or additional streets and avenues upon the established map or plan thereof, the acceptance by town officers of conveyances of land for public highways, the naming and changing of names of the streets and avenues laid down on said map or plan, and the numbering and renumbering of houses and building lots fronting on said streets and avenues; but such last-named powers in regard to the alteration of said map or plan, the laying down, laying out, opening, grading, construction, closing and change of line of such streets or avenues, or the naming or numbering as aforesaid, or such provisions for the defraying the expense thereof, shall only be exercised on the petition of the property owners who own more than one-half of the frontage of any such street or avenue, or on the certificate of the supervisor, justices of the peace, and commissioners of highways of the town, or two-thirds of such officers, that the same is in their judgment proper and necessary for the public interest; or in case the said streets or avenues in respect to which such action is proposed to be taken, shall lie in two or more towns, on a like certificate of such town officers of each of said towns, or two-thirds of all of them; provided, however, that before proceeding to make any such certificate, the said officers or such number of them as aforesaid, shall give ten days' notice by publication in one of the daily papers of said county and by posting in six public places in such town, or in each of such towns, of the time and place at which they will meet for the purpose of considering the same, at which meeting the public and all persons interested, may appear and be heard in relation thereto; and provided that no such street or avenue shall be laid out, opened or constructed upon or across any lands heretofore acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by an existing corporation formed for the purpose of improving the breed of horses, without the consent of such corporation. The provisions of this section shall not apply to the town of Flatbush in the county of Kings."

§ 72. **Survey and records of highways.**— The board may authorize and direct the commissioners of highways of any town to cause a survey to be made, at the expense of the town, or\* any or all of the highways therein, and to make or complete a systematic record thereof, or to revise, collate and rearrange existing records of highways, and correct and verify the same by new surveys and to establish the location of highways by suitable monuments. Such records so made, or revised, corrected and verified, shall be deposited with the town clerk of the town, and shall thereafter be the lawful records of the highways which they describe; but shall not affect rights pending in any judicial proceeding commenced before the deposit of such revised records with the town clerk.

**Survey by town superintendent.** The town superintendent of highways is required by section 47, subdivision 8, of the Highway Law to "cause such

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\* So in original.

highways as shall have been laid out but not sufficiently described, and such as shall have been used for over twenty years, but not recorded, to be ascertained, described and entered on record in the town clerk's office.' Where a highway is laid out by a town superintendent he is required to incorporate a survey in an order signed by him and file and record the same in the office of the town clerk. See Highway Law, § 190.

**§ 73. Regulation of toll rates.**— Such boards shall have power, by a vote of two-thirds of all the members elected to authorize an alteration, reduction or change of the rates of toll charged or received by any turnpike, plank or gravel road, or other toll road within such county, or by any bridge company or ferry within such county, or, if within more than one county, then by joint action with the supervisors of such counties, provided such alteration shall be asked for by the directors, trustees or owners of such road, bridge or ferry; but that no increase of toll shall be so authorized unless notice of intention to apply for such increase shall have been published in each of the newspapers published in such county, once in each week for six successive weeks next before the annual election of supervisors in such county; and any alteration in rates of toll authorized by any board of supervisors may be changed or modified by any subsequent board, on their own motion, by a like vote of two-thirds of all the members elected to such board; but nothing herein contained shall affect or abridge the powers of any city.

**Regulation of tolls.** The toll to be charged by a turnpike or plankroad corporation is regulated by section 130 of the Transportation Corporations Law, but the toll to be charged by a bridge corporation is to be prescribed by the board of supervisors under the above section of the County Law. The rate of ferriage must be posted as provided in section 274 of the Highway Law.

**§ 74. Highways in counties of more than 300,000 acres of unimproved land.**— The board may establish separate highway districts in counties containing more than three hundred thousand acres of unimproved unoccupied forest lands, for the purpose of constructing highways through such lands; such highway districts to be established upon the application of the owners of more than one-half of the non-resident lands therein. Any such highway district shall consist of contiguous tracts or parcels of land, and may include parts of one or more towns; and they may be changed, altered or abolished at any time by the board. Such board may appoint one or more commissioners to lay out and construct such

highways in any such district, and prescribe the powers and duties, and direct the manner in which highway taxes shall be assessed, levied and collected upon the lands within the district, and the manner of expenditure thereof.

They may also authorize such commissioners to borrow money on such terms as they may deem just, but not exceeding the amount of ten years' highway taxes upon such lands; and may, for the purpose of repaying such loan, set apart and appropriate the highway taxes upon such lands, for a period not exceeding ten years from the time of making such loan.

§ 75. **Appropriation of certain non-resident highway taxes.**—The board may, upon the application of the owners representing a majority in value, as shall be ascertained from the last annual assessment-roll of the real estate lying along the line of any highway, laid out through unimproved lands, in cases not provided for in the last preceding section authorize the appropriation of the non-resident highway tax on the lands lying along such line, for the improvement of such highways.

§ 76. **Balance of state appropriations.**—The board may direct the expenditure of any non-resident highway or bridge tax, set apart by an act of the legislature, in counties wherein such non-resident lands are situated, when the official life of commissioners appointed to receive and expend such taxes has expired.

§ 77. **Alteration of state roads.**—The board may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities.

**Application.** This section will not be construed so as to authorize the board of supervisors to control in any way State highways laid out and constructed under the provisions of Article VI of the Highway Law.

Roads cannot be abandoned arbitrarily, but the procedure as laid down by the statute must be followed and compensation must be allowed to the owners, and suitable means of access to their property be left to them. *Egerer v. N. Y. Central & H. R. R. Co.*, 41 N. Y. St. Rep. 488 (1891).

§ 78. **Further powers.**—The board may make such other local and private laws and regulations concerning highways, alleys, bridges and ferries within the county, and the assessment and apportionment of highway labor or taxes therefor, not inconsistent with law, as it may deem necessary and proper, when the

purposes of such laws and regulations can not be accomplished under the foregoing provisions, or the general laws of the state.

§ 79. **Powers as to tires on vehicles.**— The board of supervisors may enact local and private laws regulating the width of tires used on vehicles built to carry a weight of fifteen hundred pounds or upwards, and may provide penalties for the violation thereof. [*Added by L. 1894, ch. 644, and amended by L. 1899, ch. 155.*]

The rules and regulations of the State Commission of Highways may prescribe the width of tire to be used on State or county highways. The powers of the board of supervisors in respect to local and private laws regulating the width of tires must be exercised in conformity with the rules and regulations of the commission.

§ 80. **Use of abandoned turnpike, plank or macadamized roads.**— Boards of supervisors shall have power to provide for the use of abandoned turnpike, plank or macadamized roads within any town or public highways; but jurisdiction in such a case shall not be exercised without the assent of two-thirds of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its minutes. [*Added by L. 1895, ch. 756.*]

Upon the dissolution of a turnpike or plankroad corporation the turnpike or plankroad shall thereafter be a public highway, with the same effect as if laid out by a town superintendent of highways, and be subject to the laws relating to highways, and the erection, repairing and preservation of bridges thereon. *Transportations Corporations Law, § 148.* The above section authorizes boards of supervisors to assume control of such abandoned turnpikes or plankroads, upon the acquisition of a turnpike or plankroad by the board of supervisors as provided in section 298 of the Highway Law, which becomes a part of the highway system of the county and of the towns, cities and villages in which it is located. See *Highway Law, § 301.*

§ 81. **Definition of "upon its borders."**— Wherever the words "upon its borders," are used in this article in reference to the boundary line between two towns, the same is and was intended and shall be construed to mean "upon," "along," and "across its borders." [*Added by L. 1900, ch. 163.*]

## CHAPTER III.

### Railroads upon Highways.

- Section 1. Street railroads upon highways.
2. Intersection of highways, additional lands for.
  3. Grade crossings.
  4. Determination as to construction of crossings.
  5. The public service commission.
  6. Changes in existing crossings.
  7. Acquisition of lands, etc.
  8. Cost of maintaining bridge and subway.
  9. Payment of cost of construction.
  10. Proceedings to alter grade crossings:
  11. Proceedings to enforce compliance with recommendations.
  12. Town may borrow money and issue bonds.
  13. Sign boards and flagman at crossings.
  14. Ringing bells and blowing whistles at crossings; obstructions of crossings.

§ 1. **Street railroads upon highways.**—The charter of a street railroad corporation must contain the names and description of the streets, avenues and highways in which the road is to be constructed. [*Railroad Law*, § 2, *subd.* 11.]

The following provisions of Article IV of the Railroad Law, entitled "Street Surface Railroads," are applicable to street surface railroads within highways:

Any street surface railroad corporation, at any time proposing to extend its road or to construct branches thereof, may, from time to time, make and file in each of the offices in which its certificate of incorporation is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches. Upon filing any such statement and upon complying with the conditions set forth in section ninety-one of the Railroad Law every such corporation shall have the power and privilege to construct, extend, operate and maintain such road, extensions or branches, upon and along the streets, avenues, roads, highways and private property named and described in its certificate of incorporation or in such statement. [*Railroad Law*, § 90.]



A street surface railroad, or extensions or branches thereof shall not be built, extended or operated unless the consent in writing acknowledged or proved as are deeds entitled to be recorded, of the owners, in cities and villages, of one-half in value, and in towns, not within the corporate limits of a city or village, of the owners of two-thirds in value, of the property bounded on, and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad, extension or branch shall have been first obtained. \* \* \* The consents of property owners in one city, village or town, or in any other civil division of the state, shall not be of any effect in any other city, village or town, or other civil divisions of the state. Consents of property owners heretofore obtained to the building, extending, operating or change of, motive power shall be effectual for the purposes herein mentioned and may be deemed to be sufficiently proved and shall be entitled to be recorded, wherever such consents shall have been signed, executed or acknowledged before an officer authorized by law to take acknowledgments of deeds, or before or in the presence of a subscribing witness, and without regard to whether or not the subscribing witness shall have affixed his signature in the presence of the subscriber, provided that the proof of such signing, execution or acknowledgment shall have been made by such subscribing witness in the manner prescribed by chapter three, part two of the revised statutes. \* \* \* The value of the property above specified shall be ascertained and determined by the assessment roll of the city, village or town in which it is situated, completed last before the local authorities shall have given their consent, except property owned by such city, village or town, or by the state of New York, or the United States of America, the value of which shall be ascertained and determined by making the value thereof to be the same as is shown by such assessment roll to be the value of the equivalent in size and frontage of the adjacent property on the same street, or highway; and the consent of the local authorities shall operate as the consent of such city, village or town, as the owners of such property. Whenever heretofore or hereafter a railroad has been or shall be constructed and put in operation for one year or the motive power thereon has been or shall be changed and put in operation for a similar length of time, such facts shall be presumptive evidence that the requisite consents of local authorities, property owners and other authority

to the construction, maintenance and operation of such railroad or change of motive power have been duly obtained. No consent of local authorities heretofore given shall be deemed invalid because of any portion of the road or route consented to not being connected with an existing road or route of the corporation obtaining or acquiring such consent and all statements of extension filed under section ninety of this article in reference to the route or part thereof described in any consent of local authorities are hereby ratified and confirmed, whether the same were filed before or after the obtaining or acquiring of such consents, provided however that nothing herein contained shall be construed to affect any portion of a street surface railroad which is now in or upon any portion of a street which is under the jurisdiction of a park department in any city containing a population of over twelve hundred thousand inhabitants. [*Railroad Law*, § 91, as amended by L. 1892, ch. 676; L. 1893, ch. 434; L. 1894, ch. 723; L. 1895, ch. 545; L. 1896, ch. 855; L. 1901, ch. 638, and L. 1907, ch. 156.]

The application for the consent of the local authorities shall be in writing and before acting thereon such authorities shall give public notice thereof and of the time and place when it will first be considered, which notice shall be published daily in any city for at least fourteen days in two of its daily newspapers if there be two, if not, in one, to be designated by the mayor, and in any village or town for at least fourteen days in a newspaper published therein, if any there shall be, and if none, then daily in two daily newspapers if there be two, if not, one published in the city nearest such village or town. Such consent must be upon the expressed condition that the provisions of this article pertinent thereto shall be complied with, and shall be filed in the office of the clerk of the county in which such railroad is located. \* \* \* Any such notice, publication or consideration heretofore or hereafter given, made or had in substantial conformity with the requirements of this section, is and shall be sufficient notice, publication and consideration for all the purposes hereof notwithstanding any conflicting provision of any local or special act or charter. [*Railroad Law*, § 92.]

§ 2. **Intersection of highways, additional lands for:**—No railroad corporation shall erect any bridge or other obstruction across, in or over any stream or lake, navigated by steam or sail boats at the place where it may be proposed to be erected, nor shall it construct its road in, upon or across any street of any city

without the assent of the corporation of such city, nor across, upon or along any highway in any town or street in any incorporated village, without the order of the supreme court of the district in which such highway or street is situated, made at a special term thereof, after at least ten days' written notice of the intention to make application for such order shall have been given to the commissioners of highways of such town, or board of trustees of the village in which such highway or street is situated. Every railroad corporation which shall build its road along, across or upon any stream, watercourse, street, highway, plankroad or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plankroad and turnpike, thus intersected or touched, to its former state, or to such state as not to have unnecessarily impaired its usefulness, and any such highway, turnpike or plankroad may be carried by it, under or over its track, as may be found most expedient. Where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, with a view to a more easy ascent or descent, it may construct such highway, turnpike or plankroad, on such new line as its directors may select, and may take additional lands therefor by condemnation if necessary. Such lands so taken shall become part of such intersecting highway, turnpike or plankroad, and shall be held in the same manner and by the same tenure as the adjacent parts of the highway, turnpike or plankroad are held for highway purposes. Every railroad corporation shall pay all damages sustained by any turnpike or plankroad corporation in consequence of its crossing or occupation of any turnpike or plankroad, and in case of inability to agree upon the amount of such damages it may acquire the right to such crossing or occupation by condemnation. [*Railroad Law*, § 11.]

§ 3. **Grade crossings.**—All steam surface railroads, hereafter built except additional switches and sidings, must be so constructed as to avoid all public crossings at grade, whenever practicable so to do. Whenever application is made to the board of railroad commissioners, under section fifty-nine of the railroad law, there shall be filed with said board a map showing the streets, avenues and highways proposed to be crossed by the new construction, and the said board shall determine whether such crossings shall be under or over the proposed railroad, except where said board shall determine such method of crossing to be impracticable.

Whenever an application is made under this section to determine the manner of crossing, the said board shall designate a time and place when and where a hearing will be given to such railroad company, and shall notify the municipal corporation having jurisdiction over such streets, avenues or highways proposed to be crossed by the new railroad. The said board shall also give public notice of such hearing in at least two newspapers, published in the locality affected by the application, and all persons owning land in the vicinity of the proposed crossings shall have the right to be heard. The decision of the said board rendered in any proceedings under this section shall be communicated, within twenty days after final hearing, to all parties to whom notice of the hearing in said proceedings was given, or who appeared at said hearing by counsel or in person. [*Railroad Law, § 60, as added by L. 1897, ch. 754.*]

§ 4. **Determination as to construction of crossings.**— When a new street, avenue or highway, or new portion of a street, avenue or highway shall hereafter be constructed across a steam surface railroad, other than pursuant to the provisions of section sixty-two of this act, such street, avenue or highway or portion of such street, avenue or highway, shall pass over or under such railroad or at grade as the board of railroad commissioners shall direct. Notice of intention to lay out such street, avenue or highway, or new portion of a street, avenue or highway, across a steam surface railroad, shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue or highway by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. Such notice shall designate the time and place and when and where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue or highway. If the municipal corporation determines such street, avenue or highway to be necessary, it shall then apply to the board of railroad commissioners before any further proceedings are taken, to determine whether such street, avenue or highway shall pass over or under such railroad, or at grade, whereupon the said board of railroad commissioners shall appoint a time and place for hearing such application, and shall give such notice thereof, as they judge reasonable, not, however, less than ten days, to

the railroad company whose railroad is to be crossed by such new street, avenue or highway, or new portion of a street, avenue or highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue or highway to be opened or extended. The said board of railroad commissioners shall determine whether such street, avenue or highway, or new portion of a street, avenue or highway, shall be constructed over or under such railroad or at grade; and if said board determine that such street, avenue or highway shall be carried across such railroad above grade, then said board shall determine the height, the length and the material of the bridge or structure by means of which such street, avenue or highway shall be carried across such railroad, and the length, character and grades of the approaches thereto; and if said board shall determine that such street, avenue or highway shall be constructed or extended below the grade, said board shall determine the manner and method in which the same shall be so carried under, and the grade or grades thereof, and if said board shall determine that said street, avenue or highway shall be constructed or extended at grade, said board shall determine the manner and method in which the same shall be carried over said railroad at grade and what safeguards shall be maintained. The decision of the said board as to the manner and method of carrying such new street, avenue or highway, or new portion of a street, avenue or highway, across such railroad, shall be final, subject, however, to the right of appeal hereinafter given. The decision of said board rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in such proceeding was given or who appeared at such hearing by counsel or in person. [*Railroad Law*, § 61, as amended by L. 1898, ch. 520.]

The Public Service Commission has the power and performs the duties imposed by these sections upon the board of railroad commissioners.

§ 6. Changes in existing crossings.—The mayor and common council of any city, the president and trustees of any village, the town board of any town within which a street, avenue or highway crosses or is crossed by a steam surface railroad at grade, or any steam surface railroad company, whose road crosses or is crossed by a street, avenue or highway at grade, may bring their petition, in writing, to the board of railroad commissioners, therein alleg-

ing that public safety requires an alteration in the manner of such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing and discontinuance of a highway crossing and the diversion of the travel thereon to another highway or crossing, or if not practicable to change such crossing from grade or to close and discontinue the same, the opening of an additional crossing for the partial diversion of travel from the grade crossing, and praying that the same may be ordered; whereupon the said board of railroad commissioners shall appoint a time and place for hearing the petition, and shall give such personal notice thereof as they shall judge reasonable, of not less than ten days, however, to said petitioner, the railroad company, the municipality in which such crossing is situated, and to the owners of the lands adjoining such crossing and adjoining that part of the highway to be changed in grade or location, or the land to be opened for a new crossing, and shall cause notice of said hearing to be advertised in at least two newspapers published in the locality affected by the application; and after such notice of hearing the said board of railroad commissioners shall determine what alterations or changes, if any, shall be made. The decision of said board of railroad commissioners rendered in any proceeding under this section, shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person. Any person aggrieved by such decision, or by a decision made pursuant to sections sixty and sixty-one hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated and to the court of appeals, in the same manner and with like effect as is provided in the case of appeals from an order of the supreme court. [*Railroad Law*, § 62, as amended by *L. 1898, ch. 520, and L. 1899, ch. 359.*]

§ 7. **Acquisition of lands, etc.**—The municipal corporation in which the highway crossing is located, may, with the approval of the railroad company, acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of sections sixty, sixty-one and sixty-two of this act, but if unable to do so shall acquire such lands, rights or easements by condemnation either under the condemnation law,

or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein. [*Railroad Law*, § 63, as amended by *L. 1899, ch. 226.*]

§ 8. **Cost of maintaining bridge and subway.**— When a highway crosses a railroad by an overhead bridge, the frame work of the bridge and its abutments, shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality in which the same are situated; except that in the case of an overhead bridge constructed prior to the enactment of sections sixty-one and sixty-two of this act, the roadway over and the approaches to which the railroad company was under obligation to maintain and repair, such obligations shall continue, provided the railroad company shall have at least ten days' notice of any defect in the roadway thereover and the approaches thereto, which notice must be given in writing by the commissioner of highways or other duly constituted authorities, and the railroad company shall not be liable by reason of any such defect unless it shall have failed to make repairs within ten days after the service of such notice upon it. When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the subway and its approaches shall be maintained and kept in repair by the municipality in which the same are situated. [*Railroad Law*, § 64, as amended by *L. 1902, ch. 140.*]

§ 9. **Payment of cost of construction.**— Whenever, under the provisions of section sixty of this act, new railroads are constructed across existing highways, the expense of crossing above or below the grade of the highway shall be paid entirely by the railroad corporations. Whenever under the provisions of section sixty-one of this act a new street, avenue or highway is constructed across an existing railroad, the railroad corporation shall pay one-half and the municipal corporation wherein such street, avenue or highway is located, shall pay the remaining one-half of the expense of making such crossing above or below grade; and whenever a change is made as to an existing crossing in accordance with the provisions of section sixty-two of this act, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation, and twenty-five per centum by the state. When-

ever, in carrying out the provisions of sections sixty-one or sixty-two of this act, two or more lines of steam surface railroad, owned and operated by different corporations, cross a highway at a point where a change in grade is made, each corporation shall pay such proportion of fifty per centum of the expense thereof as shall be determined by the board of railroad commissioners. In carrying out the provisions of sections sixty, sixty-one and sixty-two of this act the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision of and approval of the board of railroad commissioners, and in all cases, except where the entire expense is paid by the railroad corporation, the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements, shall be paid primarily by the municipal corporation wherein such highway crossings are located. Plans and specifications of all changes proposed under sections sixty-one and sixty-two of this act, and an estimate of the expense thereof shall be submitted to the board of railroad commissioners for their approval before the letting of any contract. In case the work is done by contract the proposals of contractors shall be submitted to the board of railroad commissioners, and if the board shall determine that the bids are excessive it shall have the power to require the submission of new proposals. The board of railroad commissioners may employ temporarily such experts and engineers as may be necessary to properly supervise any work that may be undertaken under sections sixty, sixty-one or sixty-two of this act, the expense thereof to be paid by the comptroller upon the requisition and certificate of the said board, said expense to be included in the cost of the particular change in grade on account of which it is incurred and finally apportioned in the manner provided in this section. Upon the completion of the work and its approval by the board of railroad commissioners an accounting shall be had between the railroad corporation and the municipal corporation, of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation have expended more than their proportion of the expense of the crossing as herein provided, a settlement shall be forthwith made in accordance with the provisions of this section. All items of expenditure shall be verified under oath, and, in case of a dispute between the railroad corporation and the municipal corporation as to the amount expended, any



judge of the supreme court in the judicial district in which the municipality is situated, may appoint a referee to take testimony as to the amount expended, and the confirmation of the report of the referee shall be final. In the event of the failure or refusal of the railroad corporation to pay its proportion of the expense, the same, with interest from the date of such accounting, may be levied and assessed upon the railroad corporation and collected in the same manner that taxes and assessments are now collected by the municipal corporation within which the work is done; and in the event of the failure or refusal of the municipal corporation to pay its proportion of the expense, suit may be instituted by the railroad corporation for the collection of the same with interest from the date of such accounting, or the railroad corporation may offset such amount with interest against any taxes levied or assessed against it or its property by such municipal corporation. The legislature shall annually appropriate out of any moneys not otherwise appropriated the sum of one hundred thousand dollars for the purpose of paying the state's proportion of the expense of a change in an existing grade crossing. If, in any year, any less sum than one hundred thousand dollars is expended by the state for the purpose aforesaid the balance remaining unexpended shall be applied to reduce the amount appropriated by the state in the next succeeding year, except that no such deduction shall be made in case there are outstanding and unadjusted obligations on account of a change in an existing grade crossing for a proportion of which the state is liable under the provisions of this section. In the event of the appropriation made by the state in any one year being insufficient to pay the state's proportion of the expense of any change that may be ordered the first payment from the appropriation of the succeeding year shall be on account of said change, and no payment shall be made on account of any subsequent change that may be ordered, nor shall any subsequent change be ordered until the obligation of the state on account of the first named change in grade has been fully discharged, unless the same shall be provided for by an additional appropriation to be made by the legislature. The state's proportion of the expense of changing any existing grade crossing shall be paid by the state treasurer on the warrant of the comptroller, to which shall be appended the certificate of the board of railroad commissioners to the effect that the work has been properly performed and a statement showing the situation

of the crossing that has been changed, the total cost and the proportionate expense thereof, and the money shall be paid in whole or in part to the railroad corporation or to the municipal corporation as the board of railroad commissioners may direct, subject, however, to the rights of the respective parties as they appear from the accounting to be had as hereinbefore provided for. No claim for damages to property on account of the change or abolishment of any crossing under the provisions of this act shall be allowed unless notice of such claim is filed with the board of railroad commissioners within six months after completion of the work necessary for such change or abolishment. [*Railroad Law, § 65, as amended by L. 1900, ch. 517.*]

§ 10. **Proceedings to alter grade crossings.**—The railroad commissioners may, in the absence of any application therefor, when, in their opinion, public safety requires an alteration in an existing grade crossing, institute proceedings on their own motion for an alteration in such grade crossing, upon such notice as they shall deem reasonable, of not less than ten days, however, to the railroad company, the municipal corporation and the person or persons interested, and proceedings shall be conducted as provided in section sixty-two of this act. The changes in existing grade crossings authorized or required by the board of railroad commissioners in any one year shall be so distributed and apportioned over and among the railroads and the municipalities of the state as to produce such equality of burden upon them for their proportionate part of the expenses as herein provided for as the nature and circumstances of the cases before them will permit. [*Railroad Law, § 66.*]

§ 11. **Proceedings to enforce compliance with recommendations.**—It shall be the duty of the corporation, municipality or person or persons to whom the decisions or recommendations of the board of railroad commissioners are directed, as provided in sections sixty, sixty-one, sixty-two and sixty-six of this act to comply with such decisions and recommendations, and in case of their failure so to do, the board shall present the facts in the case to the attorney-general, who shall thereupon take proceedings to compel obedience to the decisions and recommendations of the board of railroad commissioners. The supreme court at a special term shall have the power in all cases of such decisions and recommendations by the board of railroad commissioners to compel compliance therewith by mandamus, subject to appeal to the

appellate division of the supreme court and the court of appeals, in the same manner, and with like effect, as is provided in case of appeals from any order of the supreme court. [*Railroad Law*, § 67.]

§ 12. **Town may borrow money and issue bonds.**—Whenever in carrying out any of the provisions of sections sixty, sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, or sixty-seven of this act, any municipality shall incur any expense or become liable for the payment of any moneys, it shall be lawful for such municipality to temporarily borrow such moneys on the notes or certificates of such municipality, and to include the amount of outstanding notes or certificates, or any part thereof, in its next annual tax levy for municipal purposes, or in the discretion of the common council in case of a city, the board of trustees in case of a village or the town board in case of a town, to borrow the same, or any part thereof, on the credit of the municipality, and to issue bonds therefor, which bonds shall be signed by the mayor and clerk in case of a city, the president and clerk in case of a village and the town board in case of a town, and shall be in such form and for such sums and be payable at such times and places with interest not exceeding four per centum per annum, as the common council in case of a city, the board of trustees in case of a village, and the town board in case of a town, shall direct. [*Railroad Law*, § 67a, as added by L. 1899, ch. 541, and thus amended by L. 1902, ch. 198.]

§ 13. **Sign boards and flagman at crossings.**—Every railroad corporation shall cause a sign board to be placed, well supported and constantly maintained, at every crossing where its road is crossed by a public highway at grade. Such sign board shall be of a shape and design to be approved by the board of railroad commissioners, and shall have suitable words painted thereon to warn travelers of the existence of such grade crossing. The board of railroad commissioners shall have power to prescribe the location and elevation of such sign and the words of warning thereon. The commission may dispense with the use of such sign boards at such crossings as they may designate in cities and villages. At any point where a railroad crosses a street, highway, turnpike, plank-road, or traveled way at grade, or where a steam railroad crosses a horse railroad at grade, and the corporation owning or operating such railroad, refuses, upon request of the local authorities, to station a flagman or erect gates, to be

opened and closed when an engine or train passes, the supreme court or the county court, may, upon the application of the local authorities and upon ten days' notice to the corporation, order that a flagman be stationed at such point, or that gates shall be erected thereat, and that a person be stationed to open and close them when an engine or train passes, or may make such other order respecting the same as it deems proper. Whenever the crossing by a railroad at grade of the streets, highways, turnpike, plank-roads, or traveled ways of any village or city, having a population by the last state or federal enumeration of less than fifty thousand, shall be protected by gates with persons to open and close the same, when an engine or train passes, the local authorities of the city or village shall not impose any limitation, less than forty miles an hour, on the rate of speed at which such engine or train shall be run, or enforce any existing limitation upon such rate of speed, less than forty miles an hour. [*Railroad Law*, § 33, as amended by *L. 1892, ch. 676, and L. 1901, ch. 301, in effect April 8, 1901.*]

§ 14. **Ringings bells and blowing whistles at crossings; obstructions of crossings.**— It is provided in section 421 of the Penal Code as follows: "A person acting as engineer, driving a locomotive on any railway in this state, who fails to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or who fails to ring the bell on the locomotive, or fails to cause the same to be rung from such point until the crossing is passed; or any officer or employe of a corporation in charge of a locomotive, train or car, who shall wilfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive, train or car for a longer period than five consecutive minutes, is guilty of a misdemeanor."

## CHAPTER IV.

### Pipe Lines, Gas and Water Mains, Electric Light, Telegraph and Telephone Wires in Highways.

- Section
1. Pipe lines in highways.
  2. Use of highways by gas corporations.
  3. Use of highways by electric light corporations.
  4. Use of highways by waterworks corporations.
    - (1) Incorporation; permits.
    - (2) Use of highway.
  5. Telegraph and telephone lines in highways.

§ 1. **Pipe lines in highways.**—Whenever any line of pipe of any such corporation shall necessarily cross any railroad, highway, turnpike or plank-road, such line of pipe shall be made to cross under such railroad, highway, turnpike or plank-road and with the least injury thereto practicable, and unless the right to cross the same shall be acquired by agreement, compensation shall be ascertained and made to the owners thereof, or to the public in case of highways, in the manner prescribed in the condemnation law, but no exclusive title or use shall be so acquired as against any railroad, turnpike or plank-road corporation, nor as against the rights of the people of this state in any public highway, but the rights acquired shall be a common use of the lands in such manner as to be of the least practical injury to such railroad, turnpike or plank-road, consistent with the use thereof by such pipe-line corporation, nor shall any such corporation take or use any lands, fixtures or erections of any railroad corporation, or have the right to acquire by condemnation the title or use, or right to run along or upon the lands of any such corporation, except for the purpose of directly crossing the same when necessary. [*Transportation Corporations Law*, § 43.]

No pipe line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section can not be obtained, application may be made to the general term of the supreme court of

the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or an order to show cause, and the court upon the hearing of the application may grant an order permitting the line to be so constructed in such manner and upon such terms as it may direct. [*Transportation Corporations Law*, § 45.]

§ 2. **Use of highways by gas corporations.**—A gas company organized under the Transportation Corporations Law has power, “if incorporated for the purpose of supplying gas for light, to manufacture gas, and to acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas as may be required in each city, town and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authorities shall have power to exempt any such corporation from taxation on their personal property for a period not exceeding three years from the organization of the corporation. Any corporation authorized under any general or special law of this state to manufacture and supply gas shall have the like powers and privileges.” [*Transportation Corporations Law*, § 61, *subd.* 1, *as amended by L. 1900, ch. 575, and L. 1902, ch. 596.*]

Municipal authorities include the town board of a town. A gas-light company may not lay its pipes in a town highway without the consent of the town board. A grant of town authorities to a gas-light company without any restriction as to highways to be occupied extends not only to highways existing at the time of the grant but also extends to highways subsequently opened. If a portion of the town is subsequently incorporated into a village the change from town to village government does not alter the rights of the gas-light company. *People ex rel. Woodhaven Gas-Light Co. v. Deehan*, 153 N. Y. 528 (1897).

§ 3. **Use of highways by electric light corporations.**—An electric light corporation organized under the Transportation Corpo-

rations Law has power, "if incorporated for the purpose of using electricity for light, heat or power, to carry on the business of lighting by electricity or using it for heat or power in cities, towns and villages within this state, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity; and to make, sell or lease all machines, instruments, apparatus and other equipments therefor, and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe." [*Transportation Corporations Law*, § 61, *subd.* 2.]

Electric light poles and wires erected in public highways do not constitute an additional burden upon the fee, where it is apparent that the condition of the highway is such that the light to be furnished by means of such poles and wires will facilitate the public use of such highways. The lighting of a highway is a street purpose, and is within the grant of lands for highway purposes whenever the necessity for such use arises; and the erection and maintenance of poles and electric wires for that purpose within the highway, without compensation to the abutting owner of the fee, is permissible as distinguished from telegraph and telephone poles and wires, which do not aid the public in traveling the highway. *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231 (1899).

§ 4. Use of highways by waterworks corporations.—(1) *Incorporation; permits.*—Seven or more persons may become a corporation for the purpose of supplying water to any of the cities, towns or villages and the inhabitants thereof in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided, the location of its principal office, the number of its directors, not less than seven, the names and places of residence of the directors for the first year, the name of the cities, towns and villages which it is proposed to supply with water; that the permit of the authorities of such cities, towns and villages herein required has been granted; the post-office address of each subscriber, and the number of shares he agrees to take in such corporation, the aggregate of which shall be at least one-tenth of the capital stock, and ten per centum of which shall be paid in cash to the directors. At the time

of filing there shall be annexed to the certificate and as a part thereof, a permit, signed and acknowledged by a majority of the board of trustees of the village, in case an incorporated village is to be supplied with water, and in case a town, or any part thereof, not within an incorporated village, is to be so supplied, by the supervisor, justice of the peace, town clerk and highway commissioners thereof or a majority of them, and in case a city is to be supplied with water by the board of water commissioners of said city, or by such other board or set of officials as perform the duties of water commissioners and have charge of the water supply for said city, authorizing the formation of such corporation for the purpose of supplying such city, village or town with water, and an affidavit of at least three of the directors that the amount of capital stock herein required has been subscribed and paid in cash. [*Transportation Corporations Law*, § 80, as amended by L. 1892, ch. 617.]

(2) *Use of highway*.—Every such corporation shall have the following additional powers:

1. To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any city, town or village in which it has obtained the permit required by section eighty of this article.

2. To lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained, provided that such right in an adjoining city or village having a population of more than twelve thousand inhabitants, shall be subject to the permission of the local authorities thereof and upon such conditions as they may prescribe. [*Idem*, § 82, as amended by L. 1905, ch. 210, and L. 1906, ch. 455.]

**Water pipes in public highways.** Permission to lay and maintain water pipes within a town highway is granted by the town superintendent with the consent of the town board. If the highway is a State or county highway, the permission is granted by the town superintendent with the consent of the county or district superintendent. See Highway Law, § 60, *ante*, p. 84. In the case of *Witcher v. Holland Water Works Co.*, 66 Hun, 619, 20 N. Y. Supp. 560, affirmed 142 N. Y. 626 (1893), it was held that a street in an unincorporated village is subject to use for the purpose of supplying water to the inhabitants of the village, and the use of such highways by a duly incorporated water works company does not impose an additional burden upon the fee of the street, although the water is not in actual use under any contract with the public authorities, but only by individual residents of the village who have contracted with the company.



§ 5. **Telegraph and telephone lines in highways.**— A telegraph or telephone corporation “ may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation cannot agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the condemnation law.” [ *Transportation Corporations Law*, § 102.]

**Telegraph and telephone lines as obstructions.** Telegraph, telephone, trolley and other poles, and the wires connected therewith, erected within the bounds of the highway in such a manner as to interfere with the use of the highway for public travel, constitute obstructions within the meaning of the Highway Law. See Highway Law, § 52, *ante*, p. 66.

**Right of abutting owners:** The rule is unquestionably settled in this State that the Legislature cannot authorize a corporation to appropriate any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires without the consent of the abutting owners, who own the fee in such highway, or unless the right to such highway for such purpose is acquired by condemnation proceedings. *Eels v. American Telephone & Telegraph Co.*, 143 N. Y. 133 (1894).

An owner of land abutting on a public highway in a town who owns the fee to the center of the highway may maintain an action in ejectment to compel the removal of telephone poles which a telephone company has erected therein, without obtaining the right so to do either by condemnation or conveyance. *Myers v. Bell Telephone Co.*, 83 App. Div. 623, 82 N. Y. Supp. 83 (1903).

Among the other cases holding that the construction and maintenance of a telegraph or telephone line within the limits of a public highway is an additional burden upon the fee, not included in the original dedication, are the following: *Blashfield v. Empire State Telephone & Telegraph Co.*, 71 Hun, 532, 24 N. Y. Supp. 1006 (1893); *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 67 How. Pr. 365 (1884); *Dusenbury v. Mutual Telegraph Co.*, 11 Abb. N. C. 440 (1882).

## CHAPTER V.

### Turnpike, Plank-road and Bridge Corporations.

[Transportation Corporations Law, Art. IX.]

- Section 1. Incorporation.
2. Restriction upon location of road.
  3. Agreement for use of highway.
  4. Application to board of supervisors.
  5. Commissioners to lay out road.
  6. Possession of and title to real estate.
  7. Use of turnpike road by plank-road.
  8. Width and construction of road.
  9. Construction of bridges; obstruction of rafts prohibited.
  10. Certificate of completion of road or bridge.
  11. Gates, rates of toll; and exemption.
  12. Toll gatherers.
  13. Penalty for running a gate.
  14. Location of gates and change thereof.
  15. Inspectors, their powers and duties.
  16. Change of route, extensions and branches.
  17. Milestones, guide-posts and hoist-gates.
  18. Location of office of corporation.
  19. Consolidation of corporations, sale of franchise.
  20. Surrender of road.
  21. Taxation and exemption.
  22. Hauling logs and timber.
  23. Encroachment of fences.
  24. Penalty for fast driving over bridges.
  25. Acts of directors prohibited.
  26. Actions for penalties.
  27. Proof of incorporation.
  28. When stockholders, to be directors.
  29. Dissolution of corporation, road to be a highway.
  30. Town must pay for lands not originally a highway.
  31. Highway labor upon line of plank-road or turnpike.
  32. Extension of corporate existence.

§ 1. **Incorporation.**— Five or more persons may become a corporation for the purpose of constructing, maintaining, and owning a turnpike, plank-road or a bridge, or causeway across any stream or channel of water, or adjoining bay, swamp, marsh, or water to form in connection with such bridge or causeway a continuous roadway across the same, by signing, acknowledging

and filing a certificate containing the name of the corporation, its duration, not exceeding fifty years, the amount and number of shares of its capital stock, the number of its directors, and their names and post-office address for the first year, the termini of the proposed road, its length, and each town, city or village into or through which it is to pass, or of a bridge, the location and plan thereof, and the post-office address of each subscriber, and the number of shares of stock which he agrees to take, the aggregate of which subscriptions shall not be less than five hundred dollars for every mile of road, or if a bridge corporation not less than one-fourth of the amount of the capital stock, and five per cent of which must be actually paid in cash. There shall be indorsed on and annexed to the certificate and made a part thereof the affidavit of at least three of the directors named therein, that the required amount of capital stock has been subscribed and the prescribed percentage paid in cash. [*Transportation Corporations Law*, § 120.]

**Application.** Article IX of the Transportation Corporations Law, relating to the incorporation of turnpike and plankroad corporations, does not apply to corporations incorporated by a special act of the Legislature. *Aurora & Buffalo Plank-Road Co. v. Schrot*, 90 Hun, 56, 35 N. Y. Supp. 602 (1895).

**Acquisition of plankroads** by boards of supervisors and the raising of money to pay for the same authorized by sections 298-300 of the Highway Law, *ante*. Boards of supervisors may authorize towns to purchase plankroads, turnpikes, tollroads or bridges. County Law, § 69a, as inserted by L. 1903, chap. 469.

§ 2. **Restrictions upon location of road.**—No such road shall be laid out through any orchard of the growth of four years or more to the injury or destruction of fruit trees, or through any garden cultivated for four years or more before the laying out of the road, or through any dwelling-house or building connected therewith, or any yards or inclosures necessary for its use or enjoyment without the consent of the owner thereof, nor shall any such corporation bridge any stream in any manner that will prevent or endanger the passage of any raft of twenty-five feet in width, or where the same is navigable by vessels or steamboats. [*Idem*, § 121.]

§ 3. **Agreement for use of highways.**—The supervisor and commissioner of highways, or a majority if there be more than one of any town, may agree in writing with any such corporation for the use of any part of a public highway therein required for

the construction of any such road, and the compensation to be paid by the corporation for taking and using such highway for such purpose on first obtaining consent of at least two-thirds of all the owners of land bounded on or along such highway, which agreement shall be filed and recorded in the town clerk's office of the town. If such agreement can not be made the corporation may acquire the right to take such highway for such purpose by condemnation. The compensation therefor shall be paid to the commissioners of highways, to be expended by them in improving the highways of the town. [*Idem*, § 122.]

§ 4. **Application to board of supervisors.**— If the lands necessary for the construction of the road or bridge of any such corporation in any county have not been procured by gift or purchase, and the right to take and use any part of any highway therein required by such corporation shall not have been procured by agreement with the supervisor and commissioners of highways of the town in which such highway is situated, the corporation may make application to the board of supervisors of each county in which such bridge or road, or any part thereof, is to be located, for authority to build, lay out and construct the same, and take the necessary real estate for such purpose. Notice of the application shall be published in at least one public newspaper in each county for six successive weeks, specifying the time and place where it will be made, the location, length and breadth of any such bridge, and the length and route of any such proposed road, its character, and each town, city and village in or through which it is to be constructed. The application may be made at any annual or special meeting of the board, and if the corporation desires a special meeting therefor any three members of the board may fix a time when the same shall be held, and notice thereof shall be served upon each of the other supervisors by delivering the same to him personally or leaving it at his place of residence at least twenty days before the meeting, and the expenses of the special meeting and of notifying the members of the board thereof shall be paid by the corporation. All persons interested therein or owning real estate in any of the towns through which it is proposed to construct the road may appear and be heard upon the hearing of the application. The board may take testimony in respect thereto, or authorize it to be taken by a committee of the board and may adjourn the hearing from time to time. After hearing the application the

board may, by an order entered in its minutes, authorize the corporation to construct such bridge or road and to take the real estate necessary for that purpose, and a copy of the order certified by the clerk of the board shall be recorded by the corporation in the office of the clerk of the county in which such bridge or road or any part thereof is to be located before any act shall be done under it. [*Idem*, § 123.]

§ 5. **Commissioners to lay out road.**— If the application for the construction of any such road is granted, the board shall appoint three disinterested persons, not owners of real estate in any town, through which the road is to be constructed or in any adjoining town, commissioners to lay out the road. They shall take the constitutional oath of office, and without necessary delay lay out the route of such road in such manner as in their opinion will best promote the public interests; they shall hear all persons interested who shall apply to be heard and may take testimony in relation thereto, and shall cause an accurate survey and description of the road and the necessary buildings and gates, signed and acknowledged by them to be recorded in the clerk's office of the county. If the road is situated in more than one county, such survey and description shall be separate as to that portion in each county and filed in the office of the clerk of the county in\* which it relates. The corporation shall pay each commissioner three dollars for every day spent by him in the performance of his duties and his necessary expenses. [*Idem*, § 124.]

§ 6. **Possession of and title to real estate.**— The route so laid out and surveyed by the commissioners shall be the route of the road, and the corporation may enter upon, take and hold for the purposes of its incorporation, the lands described in such survey as necessary for the construction of its road, and requisite buildings and gates. If for any cause the owner of any of such lands shall be incapable of selling the same or his name or residence can not, with reasonable diligence be ascertained or the corporation is unable to agree with the owner for the purchase thereof it may acquire title thereto by condemnation. [*Idem*, § 125.]

§ 7. **Use of turnpike road by plank-road.**— No plank-road shall be made on the roadway of any turnpike corporation without its consent, except for the purpose of crossing the same. Any plank-road corporation may contract with any connecting turnpike corporation for the purchase of its roadway or a part thereof,

\* So in original.

or of its stock, on such terms as may be mutually agreed upon, and such stock, if purchased, shall be held by the plank-road corporation for the benefit of its stockholders in proportion to the amount of stock held by each, and a transfer of stock in the plank-road corporation shall carry with it its proportional amount of the turnpike stock, and entitle the holder thereof to his share of the dividends derived therefrom. After the purchase of the whole of the stock of any such turnpike corporation by such plank-road corporation the directors of the plank-road corporation shall be the directors of the turnpike corporation, and shall manage its affairs and render an account of the same annually to the stockholders of the plank-road corporation. If the plank-road corporation is dissolved, its stockholders at the time of dissolution shall be the stockholders of the turnpike corporation in proportion to the amount of stock held by each, and the stock of the turnpike corporation shall thereafter be deemed to be divided into shares equal in number to the shares of stock of the late plank-road corporation, and scrip therefor shall be issued accordingly to each of the last stockholders of the plank-road corporation, and the officers of the turnpike corporation shall be the same in number as provided for in its charter or certificate of incorporation, and shall be chosen by such former stockholders of the plank-road corporation or their assigns. A corporation owning a turnpike road on or adjoining which a plank-road shall have been constructed may abandon that portion of its road on or adjoining the route of which a plank-road is actually constructed and used. [*Idem*, § 126.]

§ 8. **Width and construction of road.**— Every such plank-road shall be so constructed as to make, secure and maintain a smooth and permanent road, the track of which shall be made of timber, plank or other hard material forming a hard and even surface, and every such turnpike road shall be bedded with stone, gravel or such other material as may be found on the line thereof, and faced with broken stone or gravel, forming a hard and even surface with good and sufficient ditches on each side wherever practicable, and all such roads shall be laid out at least four rods wide and the arch or bed at least eighteen feet wide, and shall be so constructed as to permit carriages and other vehicles conveniently to pass each other, and to pass on and off such road where intersected with other roads. Any corporation which shall have once laid its road with plank may relay the same, or any part thereof,

with broken stone, gravel, shells or other hard materials, forming a good and substantial road. Any plank-road or turnpike corporation may lay iron rails on its road suitable for the use of wagons and vehicles drawn by horses or animals over its road, but no other motive power shall be used thereon. [*Idem*, § 127.]

**§ 9. Construction of bridges; obstruction of rafts prohibited.—**

Every bridge constructed by any such corporation shall be built with a good and substantial railing or siding at least four and one-half feet high, and over any stream navigable by rafts the corporation shall keep the channel of the stream above and below the bridge free and clear from all deposits, formed or occasioned by the erection of the bridge, which shall in any wise obstruct the navigation thereof, and shall be liable to all persons unreasonably or unnecessarily delayed or hindered in passing the same for all damages sustained thereby. Nothing in this act shall be construed to authorize the bridging of any river or water-course where the tide ebbs and flows, or any waters over which the federal authorities have any control, unless the consent of such federal authorities be first obtained; nor the construction of any bridge within the limits prescribed by any existing law for the erection or maintenance of any other bridge. [*Idem*, § 128, as amended by L. 1895, ch. 722; L. 1896, ch. 778.]

**§ 10. Certificate of completion of road or bridge.—**When any such corporation shall have completed its bridge or road or any five consecutive miles thereof, it may apply to the commissioners of highways of each town in which the completed road or bridge is situated to inspect the same, and if a majority of the commissioners are satisfied that the road or bridge is made and completed as required by law and in a manner safe and convenient for the public use, they shall make a certificate to that effect, which shall be filed in the office of the county clerk. Each commissioner shall be paid by the corporation two dollars per day for his services and necessary expenses. [*Idem*, § 129.]

**§ 11. Gates, rates of toll; and exemption.—**Upon filing such certificate such corporation may erect a toll-gate at such bridge or one or more toll-gates upon the road so inspected, and may demand and receive the following rates of toll, a printed list of which shall be conspicuously posted at or over each gate: If a bridge corporation, such sum as shall be from time to time prescribed by the board of supervisors of the county or counties

in which the bridge is located. If a turnpike or plank-road, for every vehicle drawn by one animal, one cent per mile, and one cent per mile for each additional animal; for every vehicle used chiefly for carrying passengers, three cents per mile, and one cent per mile for each additional animal; for every horse rode, led or driven, three-quarters of a cent per mile; for every score of sheep or swine, one and one-half cents per mile, and for every score of neat cattle, two cents per mile. When diverging roads strike any plank-road or turnpike at or near any toll-gate, the board of supervisors of the county may direct that the toll charge shall commence from the point of such divergence, and only for the distance traveled on such turnpike or plank-road, but fractions of cents may be made units of cents in favor of the plank-road or turnpike corporation. The corporation may from time to time commute, but not for a longer period than one year at any one time, with any person whose place of abode shall adjoin or be near to the road for the toll payable at the nearest gate on each side thereof, and the commutation may be renewed from year to year. No tolls shall be charged or collected at any gate, from any person going to or from public worship, a funeral, school, town meeting or election at which he is a voter to cast his vote, a military parade which he is required by law to attend, any court which he shall be required to attend as a juror or witness, nor when going to or from his required work upon any public highway, nor when transporting troops in the actual service of the United States; and no toll from persons living within one-half mile of the gate by the most usual traveled road when not engaged in the transportation of other persons or property except that persons living within one mile of the gate, by the most usually traveled road, in an incorporated village of over six thousand inhabitants, when not engaged in the transportation of the persons or property shall be exempt from the payment of toll. [*Idem*, § 130, as amended by L. 1893, ch. 538.]

§ 12. **Toll gatherers.**—Every such corporation may appoint toll gatherers to collect toll at each gate, who may detain and prevent from passing through the gate, any person riding, leading or driving animals or vehicles, subject to the payment of toll, until the toll is paid, but if he shall unreasonably hinder or delay any traveler or passenger liable to the payment of toll, or shall demand or receive from any person more toll than he is authorized by law to collect, he shall forfeit to such person the sum of



five dollars for every offense, and the corporation employing him shall be liable for the payment thereof, and for any damages sustained by any person for acts done or omitted to be done by him in his capacity of toll gatherer, if, on recovery of judgment against the toll gatherer therefor, execution thereon shall be returned *nulla bona*. [*Idem*, § 131.]

§ 13. **Penalty for running a gate.**—Any person who, with intent to avoid the payment of toll, shall pass any gate, without paying the toll required by law, or shall, with his team, carriage or horse turn out of a turnpike or plank-road and pass any gate thereon on ground adjacent thereto, shall forfeit for each offense the sum of ten dollars to the corporation injured. [*Idem*, § 132.]

§ 14. **Location of gates and change thereof.**—No such corporation shall erect any toll-gate, house, or other building within ten rods of the front of any dwelling house, barn or other out house, without the written consent of the owner, and the county judge of the county in which the same is located shall, on application, order any building so erected to be removed, and if a majority of the commissioners of highways of any town, in which a toll-gate shall be located, or in an adjoining town, shall deem the location of any gate unjust to the public interests by reason of the proximity of diverging roads or otherwise, they may, on fifteen days' written notice to the president or secretary of the corporation, apply to the county court of the county in which the gate is located, for an order to alter or change its location. On hearing such application, and viewing the premises, if deemed necessary, the court may make such order in the matter as may be just and proper. Either party may, within fifteen days thereafter, appeal to the general term of the supreme court from such order, on giving such security as the county judge, making the order, may prescribe. Upon such appeal the supreme court, on motion of either party and on due notice, shall appoint three disinterested persons who are not residents of any town through or into which such road shall run, or to or from which it is the principal thoroughfare, or any adjoining town, as referees to hear, try and determine the appeal. Such referees shall view the premises and the location of the gate, and hear the parties in the same manner as on the trial of an issue of fact by a referee in a civil action in the supreme court, and report their decision thereon and the reasons therefor, and the evidence taken thereon

to the supreme court, and such court shall review the report and render judgment thereon as justice and equity shall require, which shall be final and conclusive. The referees shall be entitled to the same fees as referees in civil actions in the supreme court, to be paid in the first instance by the party in whose favor their report or decision shall be, and the supreme court shall award judgment therefor, with such costs and expenses as it may deem reasonable, to the successful party on the appeal, which judgment shall be entered with the order affirming or reversing the order appealed from, and may be enforced by execution as a judgment of a court of record. If the order of the county court is not appealed from, it may be enforced, as the court may direct, and the court may allow such costs as may be deemed just and equitable. [*Idem*, § 133.]

§ 15. **Inspectors; their powers and duties.**—The commissioners of highways of the several towns and the trustees or other officers in the incorporated cities and villages of the state, who perform the duties of commissioners of highways in such cities and villages, shall be inspectors of plank-roads and turnpikes, in their respective towns, cities and villages. They shall inspect or cause to be inspected by one or more of them the whole of such turnpike or plank-roads as lies in their respective towns, villages or cities, at least once in each month, and whenever written complaint shall be made to any inspector, that any part of such road lying in the town, city or village of such inspector is out of repair he shall, without delay, view and examine the part complained of. If such turnpike or plank-road shall be found to be out of repair or in condition not to be conveniently used by the public, such inspectors or either of them, or the one to whom such complaint shall have been made, shall give written notice to the toll-gatherer, or person attending the gate nearest the place out of repair or in bad condition to cause the same to be put in good condition before a time therein designated not less than forty-eight hours after the service of such notice, or to appear before the county court of the county in which that part of the road is situated, at a time in said notice designated, and show cause why such turnpike or plank-road should not be repaired or put in good condition as in said notice directed. If such road shall not have been theretofore repaired or put in good condition as in said notice directed then the county court shall, upon the return of such notice hear the allegations and proofs of the parties, and it

shall always be open for that purpose; and if the court shall find such road to be out of repair or in bad condition it may give additional time for the repair thereof, or it may order the gate nearest the place out of repair or in bad condition to be immediately upon the service of the order, or at a time therein specified, thrown open and to remain open until the road shall be fully repaired at the place directed to be repaired as aforesaid. Such order shall be served in the manner therein specified upon the keeper of the gate so ordered to be thrown open. Any inspector within the town, city or village where such road has been repaired pursuant to notice or order as aforesaid, may certify that such road has been duly repaired. The fees of the inspector for the services above mentioned shall be two dollars for each day actually employed, together with necessary witnesses fees, to be paid by the corporation or person whose road is so inspected, if the gates are ordered to be thrown open, but otherwise to be charged, audited and paid in the same manner as other fees of commissioners of highways. Any inspector who neglects to perform his duties shall forfeit to the party aggrieved the sum of twenty-five dollars for each offense. Every keeper of a gate ordered to be thrown open, not immediately obeying such order or not keeping such gate open until such road shall be fully repaired or until a certificate that such road has been duly repaired is granted, or hindering or delaying any person in passing, or taking any tolls from any person passing such gate during the time it ought to be open, shall forfeit to the party aggrieved the sum of ten dollars for each offense, and the corporation or person owning the road, who shall refuse or neglect to obey the requirements of any such order shall forfeit to the people of the state the sum of two hundred dollars for each offense. [*Idem*, § 134, as amended by L. 1896, ch. 343.]

§ 16. **Change of route; extension and branches.**—Any such corporation may, with the written consent of the owners of two-thirds of its capital stock and of a majority of the commissioners of highways of the town or towns, in which any change or extension is proposed to be made, construct branches to its main line or extend the same, or change the route of its road or any part thereof, and acquire the right of way for the same in the same manner as for the original or main line, and may, by any of its officers, agents or servants, enter upon lands for the purpose of making any examination, survey or map, doing no unnecessary

damage; but before entering upon, taking or using such lands, the corporation shall make a survey and map thereof, designating thereon the lands of each owner or occupant intended to be taken or used, which shall be signed and acknowledged by the engineer making the same and the president of the corporation and filed in the office of the clerk of the county in which the land is situated. [*Idem*, § 135.]

§ 17. **Mile-stones; guide-posts and hoist-gates.**—A mile-stone or post shall be erected and maintained by every such corporation on each mile of its road, on which shall be fairly and legibly marked or inscribed the distance of such stone or post from the place of commencement of the road, and when the road shall commence at the end of any other road having mile-stones or posts on which the distance from any city or town is marked, a continuation of that distance shall in like manner be inscribed. A guide-post shall also be erected at the intersection of every public road leading into or from every turnpike or plank-road, on which shall be inscribed the name of the place to which such intersecting road leads in the direction to which the name on the guide post shall point. No plank-road or turnpike corporation shall erect or put up any hoist-gate on its road. Any person who shall willfully break, cut down, deface or injure any mile-stone, post or gate on such road, or dig up, or injure any part of the road, or anything belonging thereto, shall forfeit to the corporation twenty-five dollars for every offense, in addition to the damages resulting from the act. [*Idem*, § 136.]

§ 18. **Location of office of corporation.**—Within two weeks after the formation of any such corporation its directors shall designate some place within a county in which its road or bridge, or some part thereof shall be constructed as its office, and shall give public notice thereof by publishing the same once in each week for three successive weeks in a public newspaper in the county, and shall file a copy of the notice in the office of the county clerk of every county in which any part of the road or bridge is, or is to be constructed, and if the location of such office shall be changed, like notice of the change shall be published and filed, in which shall be specified the time of making the change, before it shall take effect. Every notice, summons or other paper required by law to be served on the corporation may be served by leaving the same at such office with any person having charge thereof, at any time between nine o'clock in the fore-

noon, and five o'clock in the afternoon of any day except Sunday or a legal holiday. [*Idem*, § 137.]

§ 19. **Consolidation of corporations and sale of franchise.**—Any two or more of such corporations may consolidate into one corporation on such terms as the persons owning two-thirds of the stock of each corporation may agree upon, and may change the name of the road on filing in the office where the original certificates of incorporation were filed, a certificate containing the names of the roads so consolidated, and the name by which such road shall thereafter be known. Any plank-road or turnpike corporation may, with the consent of the owners of sixty per cent of its stock, sell, and convey the whole or any part of its rights, property and franchises to any other domestic plank-road or turnpike corporation, and such sale and conveyance shall vest the rights, property and franchises thereby transferred in the corporation to which they are conveyed for the term of its corporate existence. [*Idem*, § 138.]

§ 20. **Surrender of road.**—The directors of any plankroad or turnpike corporation may abandon the whole or any part of its road at either or both ends thereof, upon obtaining the written consent of the stockholders, owning two-thirds of the stock of the corporation, which surrender shall be by a declaration in writing to that effect, attested by the seal of the corporation and acknowledged by the president and secretary. Such declaration and consent shall be filed and recorded in the clerk's office of the county in which any part of the road abandoned shall be situated, and the road so abandoned shall cease to be the road or the property of the corporation, and shall revert and belong to the several towns, cities and villages through which it was constructed, and the corporation shall no longer be liable to maintain it or to be assessed thereon, or permitted to collect tolls for traveling over the same, but without impairing its right to take toll on the remaining part of its road at the rate prescribed by law. And whenever any turnpike or plankroad company, now existing or hereafter created, shall abandon all or any part of its road within this state, in the manner above provided, or whenever its charter or franchise of such company shall be annulled or revoked, the road of such turnpike or plankroad company shall revert to and belong to the several towns, cities and villages through which such road shall pass. And it shall be the duty of the several towns, cities and villages acquiring any road under

this act to immediately lay out and declare the same a free public highway. And it shall be the duty of the several towns, cities and villages, to maintain and work every road acquired under the provisions of this act in the same manner as the other roads of such towns, cities and villages are maintained and worked. And any town, city or village may borrow money in the manner provided by law for the purpose of improving or repairing the same. [*Idem*, § 139, as amended by L. 1896, ch. 964.]

§ 21. **Taxation and exemption.**—So much of any bridge or toll-house of any bridge corporation as may be within any town, city or village, shall be liable to taxation therein as real estate. Toll-houses and other fixtures and all property belonging to any plank-road or turnpike corporation shall be exempt from assessment and taxation for any purpose until the surplus annual receipts of tolls on its road over necessary repairs and a suitable reserve fund for repairs or relaying of plank, shall exceed seven per cent per annum on the first cost of the road. If the assessors of any town, village or city and the corporation disagree concerning any exemption claim, the corporation may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to both parties, examine the books and vouchers of the corporation, and take such further proof as he shall deem proper, and decide whether such corporation is liable to taxation under this section, and his decision shall be final. [*Idem*, § 140.]

§ 22. **Hauling logs and timber.**—Any person who shall draw or haul or cause to be drawn or hauled, any logs, timber or other material upon the bed of any plank or turnpike road, unless the same shall be entirely elevated above the surface of the road on wheels or runners, and the road-bed shall be injured thereby, or who shall do or cause to be done any act by which the road-bed, or any ditch, sluice, culvert or drain, appertaining to any turnpike or plank-road shall be injured or obstructed, or shall divert or cause to be diverted, any stream of water so as to injure or endanger any part of such road, shall forfeit to the corporation the sum of five dollars for every offense in addition to the damages resulting from the wrongful act. [*Idem*, § 141.]

§ 23. **Encroachment of fences.**—Whenever the president or secretary of any turnpike or plank-road corporation shall notify any inspector of such roads in the county where situated that any person is erecting or has erected any fence or other structure

upon any part of the premises lawfully set apart for any such turnpike or plank-road, the inspector shall examine into the facts and order the fence or other structure to be removed if it shall appear to be upon any part of any such road, and any person neglecting or refusing to remove the same within twenty days or such further time not exceeding three months, as may be fixed by the inspector, shall forfeit to the corporation the sum of five dollars for every day, during which the fence or other structure shall remain upon such road, but no such order shall require the removal of any fence, previously erected, between the first day of December and the first day of April. [*Idem*, § 142.]

§ 24. **Penalty for fast driving over bridges.**—Any plank-road, turnpike or bridge corporation may put up and maintain at conspicuous places at each end of any bridge, owned or maintained by it, the length of whose span is not less than twenty-five feet, a notice with the following words in large characters: “One dollar fine for riding or driving over this bridge faster than a walk.” Whoever shall ride or drive faster than a walk, over any bridge, upon which such notice shall have been placed, and shall then be, shall forfeit to the corporation the sum of one dollar for every such offense. [*Idem*, § 143.]

§ 25. **Acts of directors prohibited.**—No director of any such corporation shall be concerned, directly or indirectly, in any contract for making or working any road belonging to it during the time he shall be a director. No contractor for the making of such road, or any part thereof, shall make a new contract for the performance of his work, or any part of it, other than by hiring hands, teams, carriages or utensils to be superintended and paid by himself, unless such new contract and its terms be laid before the board of directors and be approved by them. [*Idem*, § 144.]

§ 26. **Actions for penalties.**—No action to recover any penalty against any turnpike or plank-road corporation, shall be commenced or maintained against it, or any of its officers or agents, unless commenced within thirty days after the penalty was incurred. [*Idem*, § 145.]

§ 27. **Proof of incorporation.**—In any action brought by or against any domestic turnpike or plank-road corporation, which shall have been in actual operation, and in possession of a road upon which it has taken toll for five consecutive years, next preceding the commencement of the action, parol proof of such corporate existence and use shall be sufficient to establish the incor-

poration of the corporation, for all the purposes of the action, unless the opposing party shall set up a claim in his complaint or answer duly verified of title in himself to the road, or some part thereof stating the nature of his title, and right to the immediate possession and use thereof. [*Idem*, § 146.]

§ 28. **When stockholders to be directors.**—When the whole number of stockholders in any turnpike or plank-road corporation shall not exceed the number of directors specified in the certificate of incorporation, each stockholder shall be a director of such corporation, and the stockholders shall constitute the board of directors, whatever may be their number, and a majority thereof shall be a quorum for the transaction of business. [*Idem*, § 147.]

§ 29. **Dissolution of corporation.**—Every turnpike, plank-road or bridge corporation may be dissolved by the legislature when, by the income arising from tolls, it shall have been compensated for all moneys expended in purchasing, making, repairing and taking care of its road, and have received in addition thereto an average annual interest at the rate of ten per cent, and on such dissolution all the rights and property of the corporation shall vest in the people of the state. Any such corporation, which shall not within two years from the filing of its certificate of incorporation, have commenced the construction of its road or bridge and actually expended thereon ten per cent of its capital, or which shall not within five years from such filing have completed its road or bridge, or, in case such bridge is destroyed, shall not rebuild the same within five years, or which, for a period of five consecutive years shall have neglected or omitted to exercise its corporate functions shall be deemed dissolved. Where the corporation has neglected or omitted for five years to exercise its corporate functions, and its road-bed or right of way shall have been used as a public highway for that period, or where any such corporation shall have become dissolved, or where the road or any part of it of a turnpike or plank-road corporation, or the bridge of any bridge corporation, shall have been discontinued, such road-bed or right of way, and such discontinued road or bridge, and the road or bridge of any such dissolved corporation, shall thereafter be a public highway, with the same effect as if laid out by the commissioners of highways of the town, and be subject to the laws relating to highways and the erection, repairing and preservation of bridges thereon. [*Idem*, § 148.]



§ 30. **Towns must pay for lands not originally a highway.—**

When the corporate existence of any plank-road or turnpike corporation shall have ceased by limitation of time, or where any judgment of ouster or dissolution, or restraining the exercise of its franchise has been rendered in any action against it, such portion of the line of its road as was built over lands which were originally purchased by it and not previously a public highway shall not be used as a public highway, nor be taken possession or control of by the town in which the same may be, or by any of the authorities thereof or be claimed or worked or used as a public highway until the town shall pay over to the treasurer, receiver or other legal representatives of the corporation, or its assigns, the principal sum of the amounts paid by it for such lands, as shown by the deeds of conveyance thereof to it, and every such judgment shall provide accordingly. Such payments shall be made within three months after the expiration of the corporate existence of the corporation, or if any such judgment has been or shall be rendered within three months after service of written notice of the entry thereof on the supervisor of the town, and the person receiving such payment shall execute a proper discharge therefor and a conveyance to the town of all the title and interest which the corporation had in such lands at the expiration of its corporate existence. [*Idem*, § 149.]

§ 31. **Highway labor upon line of plank-road or turnpike.—**

Every person liable for highway labor living or owning property on the line of any plank-road or turnpike may, on written application to the commissioners of highways of the town, on any day previous to making out the highway warrant by the commissioners, be assessed for the highway labor upon his property upon the line of such road, in the discretion of the commissioners to be worked out upon the line of such road as a separate road district, and the commissioners shall make a separate list of the persons and property so assessed, as for a separate road district, and deliver the same to one of the directors of the corporation owning such road, who shall cause such highway labor to be worked out on such road in the same manner that oversees\* of highways are required to do, and such directors shall possess the powers and have the authority to compel the performance of such highway labor or the payment of the tax therefor as such oversees\* now have by law, and shall make like returns to the

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\* So in original.

commissioner of highways, and any person so assessed may commute for the highway labor assessed upon him or his property by paying the sum now fixed by law as the commutation for such highway labor. [*Idem*, § 150.]

§ 32. **Extension of corporate existence.**—No turnpike, plank-road or bridge corporation shall extend its corporate existence, pursuant to the provisions of the general corporation law, without the written consent of the persons owning at least two-thirds of its capital stock, nor without the consent of the board of supervisors of each county in which any part of its road or bridge is situated, which consent shall be given by a resolution of the board adopted at any regular or special meeting, and a copy of such resolution, certified by the clerk of the board, or verified by the affidavit of some member thereof, together with such consent of the stockholders, and a statement verified by the affidavit of the president and treasurer of the corporation, showing the actual capital expended upon the construction of the road, exclusive of repairs, the name of each town or ward through or into which the road passes, and, if any part of the road shall have been abandoned, the actual cost of the remaining part, exclusive of repairs, shall be filed with the certificate of the continuance of the corporate existence. No further abandonment of any road belonging to a corporation whose corporate existence has been so extended shall be made, except with the consent of a majority of the board of supervisors of the county in which the abandoned portion of the road may lie, which consent shall be filed in the office of the clerk of the county. [*Idem*, § 151.]

## CHAPTER VI.

### Highways and Bridges Over and Along Canals.

[Canal Law, Art. VII.]

- Section
1. Alteration of roads.
  2. Farm and road bridges.
  3. Commutation for bridges.
  4. Private road in lieu of bridge.
  5. Iron bridges.
  6. Models and location of bridges.
  7. Restriction on the construction of farm and road bridges.
  8. Construction of bridges by municipal corporations.
  9. Construction of lift, hoist or swing bridge by city.

§ 1. **Alteration of roads.**—If the superintendent of public works, or assistant superintendent having charge of the work, deems it necessary to discontinue or alter any part of a public road, because of its interference with the proper location or construction of any work on the canals, either of construction, repairs or improvement, he shall direct such discontinuance or alteration to be made, and file an accurate description of the part of such road so discontinued and laid out anew in the office of the town clerk of the town in which the same is situated; and from the time of filing such description, such road shall be so altered.

The passage of the part of such road so discontinued or altered shall not be obstructed until such superintendent or his assistant opens and works the part of such road so laid out anew, as to render the same passable. The written certificate of a justice of the peace of the county in which such road is situated that the part so laid out anew has been so opened and worked, shall be sufficient evidence thereof. Every alteration made by any engineer on any public road upon either of the canals before the first day of January, 1828, shall be deemed valid in law from the time of such alteration. [*Canal Law*, § 110.]

§ 2. **Farm and road bridges.**—The superintendent of public works is authorized and required to construct and hereafter maintain, at the public expense, road and street bridges over the

canals, in all places where such bridges were constructed prior to the 20th day of April, 1839, if, in his opinion, the public convenience requires that they should be continued, whether theretofore maintained at the expense of the state or of the towns, villages and cities where they are situate.

The superintendent is authorized to construct farm bridges over such canals when the same, in his opinion, are reasonably required, having reference to the accommodation of the owners of the land and a due regard to economy to the state and the convenience of navigation. But this provision does not abridge the power of the superintendent in relation to streets, roads and bridges as prescribed by law on the date above specified.

When a farm bridge is constructed in lieu of one theretofore maintained by the owner of the land and damages are claimed by such owner for the appropriation of lands or other injury done in the enlargement of the canals, the benefit derived by the owner by being relieved from the expense of maintaining the farm bridge over the canal shall be set off against any damage so claimed. [*Idem*, § 111.]

§ 3. **Commutation for bridges.**— The superintendent of public works may commute with owners and claimants of bridges over any canal, by paying such owner or claimant such sum in lieu of a bridge as may be agreed on between the claimant and the superintendent. If, in the opinion of the superintendent, a bridge should not be rebuilt, and the amount to be so paid be not agreed upon, the bridge shall not be built, but the damages sustained by such owner by being deprived of such bridge, and which the state under all the circumstances ought of right to pay, shall be ascertained in the same manner as damages for the appropriation of real property for the use of the canals, and paid by the superintendent. If the damages be claimed for the deprivation of a bridge which the claimant had before constructed or maintained, the circumstances of his being equitably bound to contribute proportionately towards the construction and maintenance of an enlarged bridge shall be taken into consideration and a proper amount on that account shall be set off against any damage to which the claimant might otherwise be entitled. [*Idem*, § 112.]

§ 4. **Private road in lieu of bridge.**— If the superintendent of public works can not agree with the owner of a farm bridge over a canal, as to the amount of commutation, in any case

where such superintendent is of opinion that the state should erect such bridge, and such superintendent determines that a private road through adjoining lands will sufficiently accommodate such owner and that the same can be laid out with economy to the state, he may apply to the commissioners of highways of the town to lay out a private road for the accommodation of the owner, in the manner prescribed by law for laying out private roads, and pay to the owner of the lands through which the same is laid out the damages assessed. [*Idem*, § 113.]

§ 5. **Iron bridges.**—When the construction of an iron bridge over a canal is ordered by the legislature, or required by the superintendent of public works, the state engineer shall prepare a plan and general specifications for the construction of such bridge and submit the plan to the canal board. On obtaining the certificate of adoption by the canal board he shall file the plan so approved in his office and a copy thereof in the office of the superintendent of public works, who shall then advertise for proposals for the work, and award the contract to the lowest responsible bidder. [*Idem*, § 114.]

§ 6. **Models and location of bridges.**—No bridge shall be constructed across any canal without first obtaining for the model and location thereof the written consent of the superintendent of public works or of a superintendent of repairs upon that line of canal which is intersected by the road or highway of which the bridge is to be a part.

Every person undertaking to construct or locate any such bridge without such consent and placing any materials for that purpose upon either bank of the canal or upon the bottom thereof, shall forfeit to the state the sum of fifty dollars, and the superintendent of public works or any assistant superintendent, superintendent of repairs or engineer may remove all such materials as soon as they are discovered, wholly without the banks of the canal. [*Idem*, § 115.]

§ 7. **Restriction on the construction of farm and road bridges.**—A person shall not be entitled to demand a farm bridge across a canal or feeder where the necessity or convenience of such bridge shall have arisen from the division or acquisition of property subsequent to the location of such canal or feeder. A street or road bridge shall not be constructed by the superintendent of public works over a canal or feeder, except upon such streets or roads as were laid out, worked or used previously to the con-

struction of the canal or feeder by which such street or road was or is obstructed; and when bridges are constructed or reconstructed upon any such streets or roads, the cost to the state shall in no case be more than is required to preserve in a safe and substantial manner the continuity of such streets or roads so as not to unnecessarily impair their usefulness.

When a bridge of a more costly nature is desired by the local authorities of a city, town, or village within whose corporate limits a bridge is to be built or rebuilt, the superintendent of public works, on presentation to him by such local authorities of plans and specifications for such bridge, approved by the state engineer, shall estimate and determine the proportion of the cost, which, in order to preserve the continuity of such streets and roads, the state ought equitably to pay, and file such estimate and determination in his office and a duplicate thereof in the office of the clerk of such city, town or village, and no more than such proportion of the cost shall be appropriated by the legislature for such purpose, and then only on condition that such city, town or village shall pay the remainder of such cost. If a private road or public highway is laid out by legal authority in such direction as to require the erection of a new bridge over a canal for the accommodation of the road, such bridge shall be so constructed and forever maintained at the expense of the town or city in which it shall be situated. [*Idem*, § 116.]

§ 8. **Construction of bridges by municipal corporations.**—A town, village or city upon the line of any canal, at its own cost and expense, with the consent and under the direction of the superintendent of public works, may erect and maintain at any point within its limits, where a bridge is not maintained by the state, such bridge across such canal, of such kind, dimensions and materials, and with such approaches as such superintendent approves, at the proper cost and expense of such town, village or city, at any point where there is not now a bridge built and maintained by the state. If such bridge shall be a hoist, lift or swing-bridge, and requires the constant attendance of bridge tenders to manage and work it, the superintendent may appoint and remove such bridge tenders as he deems necessary, and the expenses and wages thereof shall be paid to the superintendent by such town or village when he may require it, to be paid by him to such bridge tenders, and all the cost of material, power or tools necessary for the tending of such bridge shall be paid for

by such town or village on demand therefor by the superintendent.  
[*Idem*, § 117.]

§ 9. **Construction of lift, hoist or swing-bridge by city.**— The common council of any city may provide by ordinance for the erection of a lift, hoist or swing-bridge over a canal at any street in such city, and, if the superintendent of public works consents to such erection, in writing, filed with the clerk of such common council, may levy and assess the cost of the construction of such bridge on the property benefited thereby. Such bridge shall be built, operated and maintained under the supervision and control of such superintendent, but at the expense of such city or of the property adjudged by the common council thereof to be so benefited. [*Idem*, § 118.]

## CHAPTER VII.

### Motor Vehicles.

[L. 1904, chap. 538. Registration, identification and use of motor vehicles.]

- Section 1, Subd. 1. Short title.  
2. Definitions.
- 2, Subd. 1. Filing statement.  
2. Registration and record.  
3. Registration seal.  
4. Owners previously registered.  
5. Display of registration number.  
6. Registration by manufacturers or dealers.  
7. Fictitious seal or number.  
8. Unregistered vehicle not to be operated.  
9. Exemption of nonresident owners.
- 3, Subd. 1. Speed permitted.  
2. Speed at crossings, etc.  
3. Meeting horses, etc.  
4. Stopping on signal.  
5. Giving name and address.  
6. Speed tests and races.
- 4, Subd. 1. Rules of the road.  
2. Brakes, lamps, horn, etc.  
3. Local ordinances prohibited.  
4. Parks, parkways and cemeteries excepted.  
5. No effect on right to damages.
- 5, Subd. 1. Filing chauffeur's statement.  
2. Chauffeur's registration and record.  
3. Chauffeur's badge.  
4. Fictitious badge.  
5. Unregistered chauffeur cannot operate.
- 6, Subd. 1. Penalties for excessive speed, etc.  
2. Penalties for other violations.  
3. Release from custody, bail, etc.
7. Acts repealed.
8. When act takes effect.

L. 1907, chap. 127. Tolls for motor vehicles on toll-roads and bridges.

**L. 1904, chap. 538. An act in relation to the registration and identification of motor vehicles and the use of the public highways by such vehicles.**

§ 1. Subd. 1. **Short title.**— The short title of this act shall be the “motor vehicle law.” Except as otherwise herein provided,



it shall be controlling, (1) upon the registration and numbering of motor vehicles and chauffeurs, (2) on their use of the public highways, and (3) on the penalties for the violation of any of the provisions of this act.

**Subd. 2. Definitions.**—The words and phrases used in this act shall, for the purposes of this act, unless the same be contrary to or inconsistent with the context, be construed as follows: (1) “motor vehicle” shall include all vehicles propelled by any power other than muscular power, excepting such motor vehicles as run only upon rails or tracks, provided that nothing herein contained shall, except as provided by subdivision four of section three of this act, apply to motor cycles, motor bicycles, traction engines or road rollers; (2) “public highways” shall include any highway, county road, state road, public street, avenue, alley, park, parkway, driveway or public place in any city, village or town; (3) “closely built up” shall mean, (a) the territory of a city, village or town contiguous to a public highway which is at that point built up with structures devoted to business, (b) the territory of a city, village or town contiguous to a public highway not devoted to business, where for not less than one-quarter of a mile the dwelling houses on such highway average less than one hundred feet apart, and also (c) the territory outside of a city or village contiguous to a public highway within a distance of one-half mile from any post-office, provided that for a distance of at least one-quarter of a mile within such limits the dwelling houses on such highway average less than one hundred feet apart, and provided further that the local authorities having charge of such highway shall have placed conspicuously thereon signs of sufficient size to be easily readable by a person using the highway, bearing the words “Slow down to ten miles,” and also an arrow pointing in the direction where the speed is to be reduced; (4) “local authorities” shall include all officers of counties, boroughs, cities, villages or towns, as well as all boards, committees and other public officials of such counties, boroughs, cities, villages or towns; (5) “chauffeur” shall mean any person operating a motor vehicle as mechanic, employee or for hire.

**Highways defined.** See Highway Law, § 2, and notes thereunder. Classification of highways as State, county or town highways. See Highway Law, § 3.

§ 2. Subd. 1. **Filing statement.**—Every person hereafter acquiring a motor vehicle shall, for every vehicle owned by him,

file in the office of the secretary of state a statement of his name and address, with a brief description of the vehicle to be registered, including the name of the maker, factory number, style of vehicle and motor power, on a blank to be prepared and furnished by such secretary for that purpose; the filing fee shall be two dollars.

Subd. 2. **Registration and record.**—The secretary of state shall thereupon file such statement in his office, register such motor vehicle in a book or index to be kept for that purpose, and assign it a distinctive number.

Subd. 3. **Registration seal.**—The secretary of state shall forthwith on such registration, and without other fee, issue and deliver to the owner of such motor vehicle a seal of aluminum or other suitable metal, which shall be circular in form, approximately two inches in diameter, and have stamped thereon the words "Registered motor vehicle, No. —, New York motor vehicle law," with the registration number inserted therein; which seal shall thereafter at all times be conspicuously displayed on the motor vehicle, to which such number has been assigned.

Subd. 4. **Owners previously registered.**—If the vehicle has been previously registered, the certificate issued thereon shall be returned to the secretary of state and in lieu thereof such secretary shall issue to said owner a registration seal containing the number of such previous registration, upon payment of a fee of one dollar. Upon the sale of a motor vehicle, the vendor, except a manufacturer or dealer, shall within ten days return to the secretary of state the registration seal affixed to such vehicle.

The word "certificate" is not synonymous with the word "seal." When the law first went into effect paper certificates were issued to those who registered as owners of motor vehicles or chauffeurs. The law, as amended May 3, 1904, provided that metal seals should be provided, and the paper certificates be exchanged for seals, on the payment of a fee of \$1. This explanation is given because of the fact that so many persons are under the impression that by returning an old seal they can procure a new registration for a fee of \$1. [Explanatory note by Secretary of State.]

Subd. 5. **Display of registration number.**—Every motor vehicle shall also at all times have the number assigned to it by the secretary of state displayed on the back of such vehicle in such manner as to be plainly visible, the numbers to be in Arabic numerals, black on white ground, each not less than three inches in height, and each stroke to be of a width not less than half an

inch, and also as a part of such number the initial letters of the state in black on white ground, such letters to be not less than one inch in height.

**Object of provision.** The purpose of requiring the display of the registration number is manifest. The Legislature appreciated the danger to pedestrians and to people lawfully using the highway with vehicles drawn by animals from motor vehicles. Many of these vehicles are capable of obtaining a speed approximating that of railroad trains driven by steam power. It is essential to the safety of the traveling public that the speed of such vehicles should be regulated and limited. It is necessary that the vehicles may be readily identified to deter the operator from violating at will the rights of others and to enforce the laws regulating the speed and to hold the operator responsible in case of accident. The Legislature deemed that the best method of identification, both as to the vehicle and the owner and operator, would be by a number on the tag conspicuously attached to the vehicle. *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357 (1904).

**Subd. 6. Registration by manufacturers or dealers.**— A manufacturer of or dealer in motor vehicles shall register one vehicle of each style or type manufactured or dealt in by him, and be entitled to as many duplicate registration seals for each type or style so manufactured or dealt in as he may desire on payment of an additional fee of fifty cents for each duplicate seal. If a registration seal and the corresponding number shall thereafter be affixed to and displayed on every vehicle of such type or style as in this section provided, while such vehicle is being operated on the public highways, it shall be deemed a sufficient compliance with subdivisions one, three, five and eight of this section, until such vehicle shall be sold or let for hire. Nothing in this subdivision shall be construed to apply to a motor vehicle employed by a manufacturer or dealer for private use or for hire.

The exception as to automobiles registered by manufacturers and dealers does not render the requirement as to display of registration numbers violative of the Federal Constitution as class legislation. *People v. MacWilliams*, 91 App. Div. 176, 86 N. Y. Supp. 357 (1904).

**Subd. 7. Fictitious seal or number.**— No motor vehicle shall be used or operated upon the public highways after thirty days after this act takes effect which shall display thereon a registration seal or number belonging to any other vehicle or a fictitious registration seal or number.

**Subd. 8. Unregistered vehicle not to be operated.**— No motor vehicle shall be used or operated upon the public highways after

thirty days after this act takes effect, unless the owner shall have complied in all respects with this section except that any person purchasing a motor vehicle from a manufacturer, dealer or other person after this act goes into effect shall be allowed to operate such motor vehicle upon the public highways for a period of five days after the purchase and delivery thereof, provided that during such period such motor vehicle shall bear the registration number and seal of the previous owner under which it was operated or might have been operated by him.

Subd. 9. **Exemption of nonresident owners.**— The provisions of this section shall not apply to motor vehicles owned by nonresidents of this state, provided the owners thereof have complied with any law requiring the registration of owners of motor vehicles in force in the state, territory or federal district of their residence, and the registration number showing the initial of such state, territory or federal district shall be displayed on such vehicle substantially as in this section provided.

§ 3. Subd. 1. **Speed permitted.**— No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or the safety of any property; or in any event on any public highway where the territory contiguous thereto is closely built up, at a greater rate than one mile in six minutes, or elsewhere in a city or village at a greater rate than one mile in four minutes, or elsewhere outside of a city or village at a greater rate than one mile in three minutes; subject, however, to the other provisions of this act.

**Liability for excessive speed.** An operator of an automobile is bound to anticipate that he may meet persons at any point in a public street, and must keep a proper lookout for them, and have his machine under such control as will enable him to avoid a collision, also using proper care and caution, and, if necessary, must slow up, even stop. He cannot escape responsibility by merely showing that the speed of his automobile does not exceed the limit fixed by law. *Thies v. Thomas*, 77 N. Y. Supp. 276 (1902).

Subd. 2. **Speed at crossings, et cetera.**— Upon approaching a bridge, dam, sharp curve, or steep descent, and also in traversing such bridge, dam, curve or descent, a person operating a motor vehicle shall have it under control and operate it at a rate of speed not exceeding one mile in fifteen minutes, and upon approaching a crossing of intersecting highways at a speed not

greater than is reasonable and proper, having regard to the traffic then on such highway and the safety of the public.

**Subd. 3. Meeting horses, et cetera.**— Upon approaching a person walking in the roadway of a public highway, or a horse or horses, or other draft animals, being ridden, led or driven thereon, a person operating a motor vehicle shall give reasonable warning of its approach, and use every reasonable precaution to insure the safety of such person or animal, and, in the case of horses or other draft animals, to prevent frightening the same.

**Frightening horses; liability for damages.** If, as the automobile is approaching a horse at a speed of three or four miles an hour, no signal is given to stop and there appears to be nothing whatever in the contract of the horse or its driver to indicate that the horse is likely to be frightened, the fact that when the automobile reaches a point opposite the horse and five feet distant therefrom, it becomes frightened and overturns the carriage affords, as a matter of law, no basis for declaring the driver of the automobile guilty of negligence. *Davis v. Maxwell*, 108 App. Div. 128, 96 N. Y. Supp. 45 (1905).

Where the automobile is of a somewhat crude and unusual construction, giving forth a loud puffing noise, a humming sound from its engine and steam or smoke from its exhaust, defendant is liable for injury caused by such automobile frightening a horse. *Mason v. West*, 61 App. Div. 40, 70 N. Y. Supp. 478 (1901), reversing 31 Misc. 583, 65 N. Y. Supp. 651.

**Subd. 4. Stopping on signal.**— A person operating a motor vehicle or motor cycle or motor bicycle shall, at request or on signal by putting up the hand, from a person riding, leading or driving a restive horse or horses or other draft animals, bring such motor vehicle, cycle or bicycle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and, if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor vehicle is requested so to do, such person shall cause the motor of such vehicle, cycle or bicycle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others.

**Signal to stop; liability for failure.** Where the driver of the automobile, although signaled to by the owner of a vehicle drawn by a horse to stop, continued on his way and did not turn at all from the horse, the jury is justified in finding the defendant negligent and responsible for an injury occurring by reason of the horse becoming frightened at his machine. The negligence of the defendant or the contributory negligence of the plaintiff

are not questions for the court, but are questions of fact for the jury. It is incumbent upon the driver of the automobile in any case to exercise reasonable care to avoid an accident when a horse becomes unmanageable. *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253 (1905).

When defendant, after stopping his automobile at the request of the plaintiff, started up again while plaintiff's horse was still frightened, snorting and plunging, his conduct is such as to justify the holding of the defendant liable. *Knight v. Lamier*, 69 App. Div. 454, 74 N. Y. Supp. 999 (1902).

Although the driver of a horse and carriage fails to give any signal to stop, the driver of an automobile is nevertheless obliged to take notice of the surrounding circumstances, and if it is apparent that by a particular mode of proceeding he will be liable to work an injury, either by frightening the horse or by causing a collision, it is his duty to adopt some other and safer method, if with reasonable care and prudence he can do so. *Davis v. Maxwell*, 108 App. Div. 128, 96 N. Y. Supp. 45 (1905).

**Subd. 5. Giving name and address.**—In case of accident to a person or property on the public highway, due to the operation thereon of a motor vehicle, the person operating such vehicle, shall stop, and, upon request of a person injured, or any person present, give such person his name and address, and, if not the owner, the name and address of such owner.

**Subd. 6. Speed tests and races.**—Local authorities may, notwithstanding the other provisions of this section, set aside for a given time a specified public highway for speed tests or races, to be conducted under proper restrictions for the safety of the public.

**Liability for injury to person while watching race.** The fact that the race and the use of the highway for that purpose were illegal does not render the municipality or the parties participating liable to a person injured by an automobile engaged therein, regardless of any element of negligence or other misconduct. Whether the contest was a nuisance and whether there was negligence or contributory negligence are questions of fact for the jury. *Johnson v. City of New York*, 186 N. Y. 139 (1906), reversing 109 App. Div. 821, 96 N. Y. Supp. 1130.

**§ 4. Subd. 1. Rules of the road.**—Whenever a person operating a motor vehicle shall meet on a public highway any other person riding or driving a horse or horses or other draft animals, or any other vehicle, the person so operating such motor vehicle shall seasonably turn the same to the right of the center of such highway so as to pass without interference. Any such person so operating a motor vehicle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof and the rider or driver of such horse, draft animal or other vehicle

shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any such person so operating a motor vehicle shall at the intersection of public highways keep to the right of the intersection of the centers of such highways when turning to the right and pass to the right of such intersection when turning to the left. Nothing in this subdivision shall, however, be construed as limiting the meaning or effect of the provisions of section three of this act.

**Law of the road** as generally applied to the use of streets and highways is declared in Highway Law, § 292. The cases cited in the note to that section may be applied in the use of highways by motor vehicles.

Where the plaintiff on approaching the intersection of roads turned to the left, and the defendant driving an automobile coming from behind, in attempting to pass to the left, struck and injured the plaintiff's horse and wagon, it was held that as to whether defendant gave sufficient warning and properly managed his machine in attempting to pass, as well as the contributory negligence of the plaintiff, are not questions of law but of fact for the jury. *Mendelson v. Van Rensselaer*, 118 App. Div. 516, 103 N. Y. Supp. 578 (1907).

**Subd. 2. Brakes, lamps, horn, et cetera.**—Every motor vehicle while in use on a public highway shall be provided with good and efficient brakes, and also with a suitable bell, horn or other signal and be so constructed as to exhibit, during the period from one hour after sunset to one hour before sunrise, two lamps showing white lights visible within a reasonable distance in the direction toward which such vehicle is proceeding, showing the registered number of the vehicle in separate Arabic numerals, not less than one inch in height and each stroke to be not less than one-quarter of an inch in width, and also a red light visible in the reverse direction.

**Subd. 3. Local ordinances prohibited.**—Subject to the provisions of this act, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highways, or excluding or prohibiting any motor vehicle whose owner has complied with section two of this act from the free use of such highways, except such driveway, speedway or road as has been or may be expressly set apart by law for the exclusive use of horses and light carriages, or except as herein provided, in any way affecting the registration or numbering of motor vehicles or prescribing a slower rate of speed than herein specified at which such vehicles may be operated,

or the use of the public highways, contrary to or inconsistent with the provisions of this act; and all such ordinances, rules or regulations now in force are hereby declared to be of no validity or effect; provided, however, that the local authorities of cities and incorporated villages may limit by ordinance, rule or regulation hereafter adopted the speed of motor vehicles on the public highways, on condition that such ordinance, rule or regulation shall also fix the same speed limitation for all other vehicles, such speed limitation not to be in any case less than one mile in six minutes in incorporated villages, and on further condition that such city or village shall also have placed conspicuously on each main public highway where the city or village line crosses the same and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words "Slow down to — miles" (the rate being inserted) and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the penalties for violation thereof similar to and no greater than those fixed by such local authorities for violations of speed limitation by any other vehicles than motor vehicles, which penalties shall during the existence of the ordinance, rule or regulation supersede those specified in section six of this act, and provided further, that nothing in this act contained shall be construed as limiting the power of local authorities to make, enforce and maintain, further ordinances, rules or regulations, affecting motor vehicles which are offered to the public for hire.

**Municipal ordinances superseded.** The Motor Vehicle Law was passed really in the interests of the automobilists. The various rules, regulations and ordinances in the many villages and cities of the State upon various subjects of licenses, speed and penalties were so numerous, conflicting and confusing that the persons interested in the subject appealed to and succeeded in having passed by the Legislature a general act under which an automobilist in any part of the State would know exactly what his restrictions and liabilities were, and the act expressly repealed all ordinances, rules or regulations theretofore in effect with the exception of the three expressed conditions mentioned in this subdivision. *People ex rel. Hainer v. Keeper of Prison*, 121 App. Div. 645, 106 N. Y. Supp. 314 (1907), reversing 55 Misc. 611, 106 N. Y. Supp. 960, affirmed 190 N. Y. 315.

This subdivision repeals L. 1904, chap. 31, which amended the charter of the city of Buffalo so as to allow the city to impose a tax upon the owners of automobiles for the privilege of operating in its streets. *City of Buffalo v. Lewis*, 123 App. Div. 163, 108 N. Y. Supp. 450 (1908). This case has been affirmed in the Court of Appeals (see *New York Law Journal*, June 1, 1908),



where it was held that this subdivision was designed to supersede all city ordinances passed under any local act on any subject specified in this subdivision.

**Local ordinances as to speed.** This section does not fix any rate of speed, nor does it confer upon municipal authorities power to pass ordinances regulating speed; it merely limits the right which local authorities formerly had. *People v. Ellis*, 88 App. Div. 471, 85 N. Y. Supp. 120 (1903). After the passage of an ordinance in accordance with this subdivision, the provisions of the State law are superseded within the city or village both as to speed limits and as to penalties; and a conviction cannot be had under a complaint which charges a violation of the State law but not of the ordinance. *People ex rel. Heiner v. Keeper, etc.*, 55 Misc. 611, 106 N. Y. Supp. 960 (1907), reversed 121 App. Div. 645, 106 N. Y. Supp. 314.

**Penalties** may be prescribed for exceeding the rate allowed by the ordinance and a person driving a motor vehicle at a speed in excess thereof, but not in excess of the speed limitation prescribed by the general law, is liable to prosecution and punishment under the ordinance only; but any person who violated the speed limitations prescribed in the general law itself, even though such violation occurs within the limits of the municipality, remains liable to prosecution under the provisions of the general law. *People ex rel. Hainer v. Keeper of Prison*, 190 N. Y. 315 (1907), affirming 121 App. Div. 645, 106 N. Y. Supp. 314.

**Signs.** The requirement that local ordinances may be made only upon condition that the municipality shall place conspicuous signs on the highways stating the rate of speed, etc., is applicable to an ordinance of the city of New York, and such ordinance is unenforceable if the city has not posted signs as required by the statute. *People ex rel. Hainer v. Keeper of Prison*, 121 App. Div. 645, 106 N. Y. Supp. 314 (1907), reversing 55 Misc. 611, 106 N. Y. Supp. 960, affirmed 190 N. Y. 315.

**Subd. 4. Parks, parkways and cemeteries excepted.**—Local authorities may, notwithstanding the provisions of this act, make, enforce and maintain such reasonable ordinances, rules or regulations concerning the speed at which motor vehicles may be operated in any parks or parkways within a city, but, in that event, must, by signs at each entrance of such park and along such parkway, conspicuously indicate the rate of speed permitted or required, and may exclude motor vehicles from any cemetery or grounds used for the burial of the dead.

**Subd. 5. No effect on right to damages.**—Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligent use of the highways by a motor vehicle or its owner or his employee or agent.

**Due care.** One using a highway or street is entitled to rely on the presumption that the driver of an automobile will use reasonable care to avoid

injuring him. *Caesar v. Fifth Avenue Coach Co.*, 45 Misc. 331, 90 N. Y. Supp. 359 (1904); *Buscher v. New York Transportation Co.*, 106 App. Div. 493, 98 N. Y. Supp. 798 (1905).

As to whether the driver of the automobile used ordinary care is a question of fact for the jury. *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999 (1902); *Caesar v. Fifth Avenue Coach Co.*, 45 Misc. 331, 90 N. Y. Supp. 359 (1904); *Buscher v. New York Transportation Co.*, 106 App. Div. 493, 98 N. Y. Supp. 798 (1905); *Thies v. Thomas*, 77 N. Y. Supp. 276 (1902). State of facts not disclosing negligence on part of defendant. *Titus v. Tangeman*, 116 App. Div. 487, 101 N. Y. Supp. 1000 (1906).

Highway Law, § 289, which prohibits the use on highways or streets of any vehicle propelled by steam unless a person is sent at least one-eighth of a mile ahead to warn travelers, was directed against traction engines and not against automobiles. *Mason v. West*, 31 Misc. 583, 65 N. Y. Supp. 651 (1900), reversed on other grounds, 61 App. Div. 40, 70 N. Y. Supp. 478.

**Proximate cause.** The act of little boys starting an electric truck left standing in the street with the power off and the brake on is the proximate cause of a collision with a horse and wagon and exempts the owner of the truck from liability. *Berman v. Shultz*, 40 Misc. 212, 81 N. Y. Supp. 647 (1903).

**Contributory negligence** is a question of fact for the jury. *Caesar v. Fifth Avenue Coach Co.*, 45 Misc. 331, 90 N. Y. Supp. 359 (1904); *Buscher v. New York Transportation Co.*, 106 App. Div. 493, 98 N. Y. Supp. 798 (1905); *Thies v. Thomas*, 77 N. Y. Supp. 276 (1902); *Noakes v. New York Central & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522 (1907); *Coreoran v. City of New York*, 188 N. Y. 131 (1907), reversing 114 App. Div. 910, 99 N. Y. Supp. 1136. For state of facts failing to show defendant negligent and plaintiff free from contributory negligence, see *Polsky v. New York Transportation Co.*, 96 App. Div. 613, 88 N. Y. Supp. 1024 (1904).

If an automobile comes upon a child under circumstances such as to produce fright, and such fright causes an error of judgment by which he runs in front of the automobile, he is not guilty of contributory negligence. *Thies v. Thomas*, 77 N. Y. Supp. 276 (1902).

A chauffeur is guilty of contributory negligence, as a matter of law, when being of full age and in possession of his faculties he was injured by a railroad train after the train was in full sight long enough to have enabled him to stop the machine and he was going slow enough to have done so. *Spencer v. New York Central & H. R. R. Co.*, 123 App. Div. 789, 108 N. Y. Supp. 245 (1908).

**Liability of owner for acts of chauffeur.** Where defendant's employee was on the occasion of the accident directed to accompany the operator of the machine for the purpose of assisting and instructing him in its operation, the negligence of the operator is imputable to defendant. *Parker v. Homan*, 88 N. Y. Supp. 137 (1904). See, also, *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619 (1903); *Shepard v. Wood*, 116 App. Div. 861, 102 N. Y. Supp. 306 (1907). But such employee must be engaged in defendant's business. *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771 (1905).

An owner who allows his son, twenty years of age, to drive such vehicle at his pleasure is not liable for injuries received by his son's negligence, when the owner was not present and the son was not acting for him but

was driving the car for his own purposes. The relation of master and servant must be shown. *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228 (1908). See, also, *Titus v. Tangeman*, 116 App. Div. 487, 101 N. Y. Supp. 1000 (1906).

An express company which hires a motor van to deliver packages, but has no power or obligation to repair it, and which is operated by a chauffeur furnished by the bailor, is not liable for the death of a pedestrian who was run over by reason of a defect in the steering gear at a time when the chauffeur, having finished delivering packages, was either taking the vehicle to his employer for repair or was going to get his luncheon. Where no negligence on the part of the chauffeur is shown, the proximate cause is the defect in the steering gear. *Bohan v. Metropolitan Express Co.*, 122 App. Div. 590, 107 N. Y. Supp. 530 (1907).

Passenger not chargeable with negligence of chauffeur. A passenger in an automobile, having nothing to do with the management or control thereof, is not chargeable with the negligence of the driver of the machine. *Ward v. Brooklyn Heights R. R. Co.*, 119 App. Div. 487, 104 N. Y. Supp. 95 (1907); *Sherwood v. New York Central & H. R. R. R. Co.*, 120 App. Div. 639, 105 N. Y. Supp. 547 (1907); *Noakes v. New York Central & H. R. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522 (1907).

Although a passenger in an automobile is not chargeable with the contributory negligence of the driver, he is nevertheless guilty of contributory negligence if being of full age and in possession of his faculties he fails to look and listen at a railroad crossing, when he might have seen an approaching train and caused the chauffeur to stop. His duty to look and listen is governed by age, sex and position in the vehicle. *Read v. New York Central & Hudson River R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068 (1908).

While a municipal corporation is not an insurer of travelers using its streets, and owes no special duty to those who ride in automobiles, it is at all times bound to use due care to keep its public and much-used streets safe and free from dangerous defects, and such streets may be as freely used by those who ride in automobiles as by pedestrians or other travelers. *Corcoran v. City of New York*, 188 N. Y. 131 (1907), reversing 114 App. Div. 916, 99 N. Y. Supp. 1136.

An automobile station or garage along a boulevard is not a common-law nuisance. *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. 125 (1904).

Pleadings. Bill of particulars in a case where plaintiff's horse and carriage were run down by defendant's automobile. *Shepard v. Wood*, 116 App. Div. 861, 102 N. Y. Supp. 306 (1907); *Harrington v. Stillman*, 120 App. Div. 659, 105 N. Y. Supp. 75 (1907).

§ 5. Subd. 1. **Filing chauffeur's statement.**—Every person hereafter desiring to operate a motor vehicle as a chauffeur shall file in the office of the secretary of state, on a blank to be supplied by such secretary, a statement which shall include his name and address and the trade name and motive power of the motor vehicle or vehicles he is able to operate; and shall pay a registration fee of two dollars.

Subd. 2. **Chauffeur's registration and record.**— The secretary of state shall thereupon file such statement in his office, register such chauffeur in a book or index to be kept for that purpose, and assign him a number.

Subd. 3. **Chauffeur's badge.**— The secretary of state shall forthwith, upon such registration and without other fee, issue and deliver to such chauffeur a badge of aluminum or other suitable metal, which shall be oval in form, and the greater diameter of which shall not be more than two inches, and such badge shall have stamped thereon the words: "Registered chauffeur, No. —, New York motor vehicle law," with the registration number inserted therein; which badge shall thereafter be worn by such chauffeur pinned upon his clothing in a conspicuous place at all times while he is operating a motor vehicle upon the public highways. If the operator or chauffeur has previously been registered in the office of the secretary of state, the certificate heretofore issued to him, shall be returned to such secretary, who shall issue to said operator or chauffeur, in lieu thereof, a chauffeur's badge upon the payment of a fee of one dollar.

Subd. 4. **Fictitious badge.**— No chauffeur, having registered as hereinabove provided, shall voluntarily permit any other person to wear his badge, nor shall any person while operating a motor vehicle wear any badge belonging to another person, or a fictitious badge.

Subd. 5. **Unregistered chauffeur cannot operate.**— No person shall operate a motor vehicle as a chauffeur upon the public highways after thirty days after this act takes effect, unless such person shall have complied in all respects with the requirements of this section.

§ 6. Subd. 1. **Penalties for excessive speed, et cetera.**— The violation of any of the provisions of subdivision five of section two, or of subdivision seven of section two, or of section three, or of section five of this act, or of any ordinance, rule or regulation adopted by local authorities in pursuance of subdivision four of section four of this act, shall be deemed a misdemeanor, punishable by a fine not exceeding one hundred dollars for the first offense, and punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding thirty days, or both, for a second offense, and punishable by a fine of not less than one hundred dollars nor more than two hundred

and fifty dollars and imprisonment not exceeding thirty days for a third or subsequent offense.

A person convicted in a Court of Special Sessions of unlawfully operating a motor vehicle has no right of appeal where sentence is suspended. *People v. Markham*, 99 N. Y. Supp. 1092 (1906).

**Subd. 2. Penalties for other violations.**—The violation of any other provision of this act shall be punished by a fine not exceeding twenty-five dollars for the first offense, a fine not less than twenty-five dollars nor more than fifty dollars for a second offense, and a fine not less than fifty dollars nor more than one hundred dollars, or imprisonment not exceeding ten days, or both, for a third or subsequent offense.

**Subd. 3. Release from custody, bail, et cetera.**—In case the owner of a motor vehicle shall be taken into custody because of a violation of any provision of this act, he shall be forthwith taken before an accessible captain or a sergeant or acting sergeant of police in any city or village, or any justice of the peace or magistrate, and be entitled to an immediate hearing; and if such hearing cannot then be had he shall be released from custody on giving a bond or undertaking executed by a fidelity or surety company organized under the laws of this state and having a deposit of at least two hundred thousand dollars with the superintendent of insurance of this state, said bond or undertaking to be in an amount not exceeding the maximum fine for the offense with which the owner is charged and to be conditioned for the owner's appearance in answer for such violation at such time and place as shall then be indicated; or on giving his personal undertaking to appear in answer for such violation, at such time and place as shall then be indicated, secured by the deposit of a sum equal to the maximum fine for the offense with which he is charged, or in lieu thereof, by leaving the motor vehicle, being operated by such person with such officer; or in case such officer is not accessible, be forthwith released from custody on giving his name and address to the officer making such arrest, and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made, or in lieu thereof, by leaving the motor vehicle, being operated by such person, with such officer, provided, that in such case the officer making such arrest shall give a receipt in writing for such sum or vehicle and notify such person to appear before the most accessible magistrate, naming him, on that or the following day, specifying the place and hour. In case

security shall be deposited, as in this subdivision provided, it shall be returned to the person depositing, forthwith on such person giving a bond or undertaking of a fidelity or surety company, as in this section provided, or on such person being admitted to bail as provided in section five hundred and fifty-four of the code of criminal procedure, and the return of any receipt or other voucher given at the time of such deposit. In case such undertaking of a fidelity or surety company be not given, or such personal undertaking with security or such deposit shall not be made by an owner so taken into custody, the provisions of section five hundred and fifty-four of the code of criminal procedure, shall apply. [*Thus amended by L. 1906, ch. 128.*]

**Rewards.** A district attorney has no authority to offer rewards to be paid to persons furnishing evidence upon which convictions shall be had of anticipated violations of the Motor Vehicle Law. The audit of claims for such rewards may be restrained by a taxpayer. *McNeil v. Board of Supervisors*, 114 App. Div. 761, 100 N. Y. Supp. 239 (1906).

§ 7. **Acts repealed.**—All acts and parts of acts inconsistent herewith or contrary hereto are, so far as they are inconsistent or contrary, hereby repealed.

§ 8. **When this act takes effect.**—This act shall take effect immediately, except that no penalty shall be asserted or imposed for the violation of any of the provisions of section two or section five hereof committed prior to thirty days after this act takes effect.

**L. 1907, ch. 127.**—An act to regulate, fix and prescribe tolls for motor vehicles traveling upon toll roads and bridges, where such tolls are not otherwise prescribed by law.

Section 1. Where a different rate is not otherwise prescribed or permitted by law, any person or corporation maintaining a plank road, turnpike road or bridge and authorized, or which shall be hereafter authorized, to receive tolls for the passage of vehicles over the same, may charge and receive for each and every motor vehicle propelled by any power other than animal power, passing over the same, a toll rate not greater than the maximum rate allowed by law to be charged and received for the passage of a vehicle drawn over such road or bridge by two animals, provided that for such motor vehicles designed to carry only two persons the rate of toll charged or received shall not exceed the maximum rate allowed by law to be charged and received for the passage

of a vehicle drawn over such road or bridge, without a load, by a single animal.

**Tolls.** A bridge company carrying a highway across a lake and authorized by its charter to collect tolls for the passage of certain vehicles and animals may not demand tolls for the passage of an automobile, which is not within the terms of its charter, but is limited to the tolls specifically allowed. All other animals and vehicles than those so provided for must be presumed to have the right to cross free. *Mallory v. Saratoga Lake Bridge Co.*, 53 Misc. 446, 104 N. Y. Supp. 1025 (1907).





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**PART II,**  
**Improvement, Repairs, and Maintenance of Highways**  
**and Bridges.**

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By Frank D. Lyon, Former State Special Examiner of Highways.



## PART II.

### Improvements, Repairs and Maintenance of Highways and Bridges.

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#### PREFATORY NOTE.

The new Highway Law is the product of an exhaustive investigation carried on by a joint special legislative committee which was created by the Legislature of 1907 and will hereafter be known as the Highway Law of 1908 (chap. 330, Laws of 1908).

It establishes a department of highways and the administrative responsibility is to be vested in three commissioners of highways to be appointed by the Governor. In the preparation of this law the committee were not unmindful of the fact that system is the first essential in any scheme for the repair and improvement of the highways of the State. It was recognized as a fact that not merely the work of a single year, but the carrying out of a carefully devised plan or scheme for a series of years must be considered.

Definite rules and regulations will undoubtedly be prescribed by the Commission (see Highway Law, § 14, subd. 2) and in accordance therewith the division engineers, district and county superintendents and the town superintendents will be able to formulate proper plans or schemes so that there will not be a lack of method or system, which is the greatest drawback to the economical repair and improvement of the public highways. Heretofore expenditures have, in many instances, been made on lines independent of each other and without thought of future work and requirements.

It is reasonable to expect that by a generous amount of "improvement" and "repair" each year, the highways of the State will rapidly improve.

The commission, division engineers, district or county superintendents and town superintendents will doubtless co-operate by laying down and following out rules, regulations and plans for

each year's work, so that it will result in bringing all highways and bridges to fixed standards within a limited term of years. This cannot be worked out in all details at once, but the desired end should be kept constantly in view.

One of the first needs of the State, and more particularly of the counties and towns, is a comprehensive map of each county including all of the towns, showing all of the highways of the State. This would be valuable for keeping a record and designation of highways and bridges repaired and improved, or to be repaired and improved. It would at once become apparent that certain highways would need more substantial construction than others and that the improvement of certain routes would be of benefit to the greatest number of people; that certain connecting links would be needed, not only in perfecting the State and county system, but the town system as well. Reports obtained from the town superintendents, district and county superintendents and division engineers could then be made with reference to a map of that character, which would aid in perfecting the complete system. Records could be made which would be comprehensive, showing the exact condition of State, county and town highways and the extent of what might be classified as permanent improvement by the town with the aid of the State, such as roads which have been crowned and shaped, surfaced with gravel or broken stone and also the number of culverts and bridges, their condition and the material of which they are constructed. With a complete county and township map and such recorded reports to guide them, the commission, boards of supervisors and town boards would be in a position to comprehend the requirements locally, which would assist them and their successors in adopting and following out methods systematically in providing for highway improvement and development.

In carrying out such plans, provision should in the first place be made for certain works of permanent improvement in different parts of the State, counties and towns. At the same time certain other more scattered repairs and improvements could be made so as to provide for the rightful expectations of citizens in respect to their public highways. On the other hand the commission, division engineers, district and county superintendents and town

superintendents must, in fulfilling the public trust imposed on them, be guarded in dealing with the requests and demands of residents who cannot consider any road excepting those in front of their own premises.

### Value of Highway Improvement.

The value of good roads can scarcely be over-estimated. The State, county and town cannot attain to their full share of prosperity until each and every mile of the seventy-six thousand miles of highway in the State have been repaired and improved. The amount of travel which each highway or section thereof is called upon to carry, naturally and necessarily governs the required time, attention and necessary outlay therefor.

Steam and trolley railways will not and cannot take the place of public thoroughfares. The construction of such railways simply creates a demand for good roads. The distinction between good roads and bad roads implies that the communities through which they pass are progressive or dormant, prosperous or non-prosperous, enjoyable or unpleasant.

The proper maintenance, repair and improvement of public highways is dependent upon skill, experienced direction and an efficient system. It has been ten years since the adoption of the Higbie-Armstrong and Fuller Plank acts and it is to be regretted that we have not more capable and efficient road builders. A problem not easy of solution has been to devise means so that the towns of the State, either by an appointive or an elective system, can secure men of the right character to take charge of work of this importance; and when once appointed or elected, there should be no disposition on the part of the authorities of the town to demand a change on account of personal pique or for any other reason excepting malfeasance or misfeasance in office. Permanency in office is an essential. In towns, local men have been selected, who necessarily must gain their knowledge at the expense of the town. The best man obtainable, regardless of political affiliations, should be elected or appointed as town superintendent. He should be a man of good practical judgment, capable of laying out the work, and of handling and directing men; he should make a careful study of the principles of roadmaking

and the local conditions in order that the best results may be obtained. Drainage, grading, crushing stone, the selection, hauling, and handling of stone and gravel, the method of placing these materials on the road, all suggest the many details which tend to economical and good results.

Good roads are important to the financial, social and educational welfare of any community and any enumeration of their advantages is likely to include all the benefits. The principal advantages of good roads are as follows: They decrease the cost of transportation; they permit the cultivation of crops not otherwise marketable; they give a longer time for the marketing of crops; they permit marketing to be done when prices are most favorable; they give a wider choice of marketing places; they tend to equalize railroad traffic; they tend to equalize mercantile business between different seasons of the year; they permit more easy intercourse between residents of rural communities and also between rural and urban populations; they facilitate the consolidation of rural schools and the rural free delivery system.

The important changes as a result of this new law make it appropriate to prepare suggestions and information for the guidance of officials who now have, or may hereafter have by law, the care and supervision of the public highways and bridges and also for the guidance of assessors, supervisors, clerks of boards of supervisors, town clerks and others in the performance of their duties as prescribed. These suggestions are inserted without anticipating the specific rules which the new Highway Commission will formulate and put in operation early in the spring of 1909. The right of the traveling public to have the seventy-six thousand miles of public highways in this State efficiently improved, repaired and maintained is a matter of vital importance, and therefore it seems proper, not only to furnish proper information to the officials, but to the public at large in order that there may be a clear understanding of the rights and duties of all. The object of the law is to provide an organization, and the Commission will undoubtedly prescribe rules and regulations to deal with the methods of conducting the work, to the end that the best possible results may be secured.

## SUGGESTIONS FOR THE GUIDANCE OF TOWN SUPERINTENDENTS RELATIVE TO TOWN HIGHWAYS.

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### Mileage of Town Highways.

The town superintendent should immediately ascertain the number of miles of highways within the town.

#### NOTES.

1. Tables of mileage heretofore prepared by the State Engineer are approximately correct, and the town superintendent may use the same until he shall have measured the highways as required by the Highway Law. (See § 69, p. 97; also § 102, p. 152.)

2. The town superintendent should then carefully ascertain, by measurement, the mileage of those sections of highways which have been surfaced with gravel, or crushed stone, and those which have been shaped and crowned. (See Highway Law, § 69, p. 97.)

3. The town superintendent may measure the highways of his town by the use of a cyclometer attached to a wagon, bicycle or other vehicle. (See Highway Law, § 69, p. 97.)

4. The town superintendent should then prepare a report in triplicate and certify to the same and file one copy with the town clerk, one with the district or county superintendent and forward one to the commission at Albany. (See Highway Law, § 69, p. 97.)

5. It is absolutely necessary that the town superintendent should carefully measure the highways of his town, as the amount of money necessary to be levied and collected for the repair and improvement of highways including sluices, culverts and bridges with a span of less than five feet, is based upon the total mileage of the town (See Highway Law, § 90, subd. 1, p. 117), and the amount of money to be paid by the State to the town is always based upon such mileage. (See Highway Law, §§ 102 and 141, pp. 152, 209.)

### Annual Estimates.

The town superintendent must make a written statement annually on or before the thirty-first day of October containing his estimate, which must be divided into four parts, viz.:

First, showing the amount of money necessary to be levied and collected for the repair and improvement of highways, sluices, culverts and bridges with a span of less than five feet.

Second, for the repair and construction of bridges having a span of five feet or more.

Third, for the purchase, repair and custody of stone crushers, steam rollers, traction engines, road machines for grading and scraping, tools and implements.

Fourth, for the removal of obstructions caused by snow and for other miscellaneous purposes.

#### NOTES.

1. The report as before specified must be filed with the town clerk on or before the thirty-first day of October, and the town superintendent should carefully read the provisions of section 90 (p. 116), and section 94 (p. 134), which prescribes the limitations of the amounts which must not be exceeded in the levy and collection of taxes.

2. The town superintendent should be very careful to include in his estimate for miscellaneous purposes as provided by section 90, subdivision 4 (p. 117), the amount of money necessary to be used in defraying the expenses incurred in enforcing the provisions of section 54 (p. 74), in accordance with the provisions of section 47, subdivision 7 (p. 56), of the Highway Law. He should also include in the estimate for miscellaneous purposes the amount of money necessary for the payment of allowances for shade trees and the compensation for watering troughs.

3. He should also include in his estimate for miscellaneous purposes the amount of money necessary to be levied and collected for the repairs to machinery, tools and implements and also the estimated cost for storing the same must be included in the estimate of the town superintendent under the provisions of section 90, subdivision 3, of the Highway Law.

4. The town superintendent in making his statement, containing the estimate of the amount of money necessary to be levied and collected for the repair and improvement of highways, sluices, culverts and bridges having a span of less than five feet, under the provisions of section 90, subdivision 1, of the Highway Law, will find the following useful in making such statement, as it is prepared in accordance with the provisions of section 101, subdivisions 1, 2, 3, 4, 5 and 6.

Under subdivision 1 of section 101 the amount of money necessary to be levied and collected by the town is fifteen dollars and the amount to be paid by the State is fifteen dollars, equal to thirty dollars for each mile of highway within the town.

Under subdivision 2 the amount of money necessary to be levied and collected by the town is fifteen dollars, seventy-eight and nine-tenths cents and the amount to be paid by the State is fourteen dollars and twenty-one and one-tenth cents, equal to thirty dollars per mile for each mile of highway.

Under subdivision 3 the amount of money necessary to be levied and collected by the town is sixteen dollars and sixty-six and six-tenths cents and the amount to be received from the State is thirteen dollars and thirty-three and four-tenths cents, equal to thirty dollars for each mile of highway.

Under subdivision 4 the amount of money necessary to be levied and collected by the town is seventeen dollars and sixty-four and seven-tenths cents and the amount of money to be paid by the State is twelve dollars and



thirty-five and three-tenths cents, equal to thirty dollars for each mile of highway.

Under subdivision 5 the amount of money necessary to be levied and collected by the town is eighteen dollars and seventy-five cents and the amount to be paid by the State is eleven dollars and twenty-five cents, equal to thirty dollars for each and every mile of highway.

Under subdivision 6 the amount of money necessary to be levied and collected by the town is twenty dollars and the amount to be paid by the State is ten dollars, equal to thirty dollars for each and every mile of highway.

5. Highway commissioners in office when this law takes effect should observe these suggestions and directions until their successors have duly qualified. (See Highway Law, § 43, p. 38, and § 317, p. 359.)

### Attendance at Town Board Meetings.

The town superintendent should attend the meeting of the town board held on the Thursday succeeding general election in each year.

#### NOTES.

1. It is important that he should attend this meeting to explain to the town board the items contained in his estimate.

2. If in the judgment of the town superintendent the sum of one thousand dollars in addition to the amount of money contained in his original estimate (See § 90, subd. 4, p. 117) will be insufficient to remove obstructions caused by snow, he should make a verbal statement to that effect in order that the town board may be prepared to take advantage of the provisions of section 92 of the Highway Law.

### Organization of Forces.

The town superintendent should, as soon as practicable after the meeting of the town board in November, organize his forces in each particular section by the selection and appointment of competent men to take charge of and to perform the work in the removal of obstructions caused by snow and to take charge of and perform highway and bridge work during the ensuing year.

#### NOTES.

1. The old overseer system is abolished, and overseers of highways must not be appointed but the town superintendent may select a person or persons in parts or sections for the specific purpose of preventing obstructions caused by snow or the removal thereof. This should be done in order that the locality may receive prompt relief.

2. Particular attention is called to the subject-matter relating to the prevention of obstructions caused by snow and the removal of the same by the use of a snow roller. (See p. 515.)

3. In organizing forces for highway and bridge work during the ensuing year, it will be noticed that section 47, subdivision 4, provides for the employment of persons with teams and implements, subject to the approval of the town board and that a list of names of persons so employed, with compensation paid to each, shall be filed in the office of the town clerk.

4. It is not the intent of the law that the town board should interfere with the town superintendent in the employment of persons with teams and implements. The approval of the town board should only apply to the prevailing prices of labor, hire of teams and machinery, and the character of the same to the end that the highway moneys shall be expended and the work performed in a creditable and economical manner.

5. It is important that the town superintendent should carefully consider these suggestions in order that the prevention of obstructions caused by snow and the removal thereof, may be promptly attended to and that the work upon the highways may be commenced in the Spring as early as the weather conditions will permit.

### When Highway Work Must be Done.

Town superintendents should so organize their forces that each and every mile of earth road can be placed in the best possible condition on or before the first day of June in each year, or as soon thereafter as conditions will permit.

#### NOTES.

1. Section 47, subdivision 3, provides that the town must be divided into as many parts or sections as may be necessary to accomplish this work prior to the time above specified.

2. The traveling public should not be annoyed nor inconvenienced by reason of the public highways not having been placed in proper condition on or about the first day of June in each year, through the inefficiency or lack of interest on the part of the town superintendent and his appointees and employees.

3. Town superintendents should thoroughly understand that it is a useless waste of time, energy and money to attempt to work public highways by the use of a ripper or road machine for grading and scraping during the Summer and Fall after the earth has become baked and hardened.

4. In dividing the town into parts or sections as prescribed by section 47, subdivision 3, it is suggested that such part or section comprise a minimum of not less than twenty miles, although the local conditions may be such that the district or section should be larger according to the number of men employed in each and the kind and class of power.

5. It will be found that much better results can be accomplished by the use of steam rollers or traction engines for power, in operating rippers and road machines for grading and scraping, instead of teams. (See Highway Law, § 50, p. 65.)

### Instruction and Equipment.

The town superintendent, after having carefully selected persons with teams and implements and organized his forces, should then thoroughly instruct the men who are to have charge and he should provide them with suitable tools, machinery and labor to properly perform the highway and bridge work of the town.

#### NOTES.

1. Inferior equipment is expensive and labor and teams should not commence work until proper equipment is provided.

2. Wagons should be provided with a dump box sufficiently large to hold a reasonable load of usually not less than one and a half cubic yards of road material as it takes but a little longer to haul a proper load. Proper care in this respect will save a large per cent in cost.

3. Labor and teams should not be allowed to come to their work late and leave early. An honest day's work should be required in all instances.

4. It is important that all of the machinery, tools and implements owned by the town should have been inspected and all necessary repairs should have been made to the same in order that the highway work may be commenced without delay as early in the Spring as conditions will permit.

5. Repairs to machinery, tools and implements should be made prior to the time when road work must necessarily begin in the Spring, and parts of machines and implements, such as scraper blades, plough points, whiffletrees, etc., which are liable to break or wear out, should be purchased and kept on hand at all times.

6. If, in the judgment of the town superintendent, new machinery, tools and implements are required, he should include the probable cost thereof in his annual estimate. If in his judgment, at any subsequent time, any machinery, tools and implements are required, he should immediately notify the supervisor of such fact and if no funds are available for such purpose, a sufficient amount may be raised in accordance with the provisions of section 92 of the Highway Law (p. 123).

7. The attention of the town superintendent is called to the provisions of section 90, subdivision 3, which to his estimate of the amount of money necessary to be levied and collected for the purchase and repair of tools, implements and machinery and the town board in the performance of their duties as prescribed by section 91, should be careful to provide the amount of money necessary for such purposes.

### Drainage.

As early in the Spring as conditions will permit, waterways, ditches and culverts should be opened and cleaned and the work of perfecting the drainage and improving the surface of the road commenced.

#### NOTES.

1. There should be no delay in commencing the work of opening and cleaning ditches and culverts as soon as the frost is out of the ground. Work

of this kind can usually be performed before the work of improving the surface of the road can be commenced.

2. In opening ditches and culverts great care should be exercised in straightening the ditch line and in preserving the proper fall and grade so that the water may be quickly and easily carried away.

3. The town superintendent should be careful to get the water off the road, out of the road and away from the road.

4. Good results can be obtained by ploughing the sides of the earth road and dragging the same in the preceding Fall; but the ploughing should be done at the edge of the ditch and not too close to the wheel track, and care should be taken not to construct or maintain a ditch at too great a distance from the center of the road, thus making the road too wide. Ordinarily a ditch or gutter should be twelve feet from the center of the road.

5. Section 47, subdivision 5 (p. 55) provides that the town superintendent shall construct and keep in repair sluices and culverts and cause the waterways, ditches and culverts to be kept open.

6. The digging of a gutter or building diagonally across the road a small dam, commonly called a "thank you, ma'am," should never be permitted. Small V-shaped water breaks may sometimes be constructed for the purpose of intercepting the water, thus preventing it from following the wheel tracks and causing ruts.

### Surfacing and Resurfacing.

All roads which are to be surfaced or resurfaced with gravel, broken stone, or other road material should first be thoroughly drained and then brought to a proper crown of about one inch fall to the foot, excepting on steep grades where the fall should be increased.

#### NOTES.

1. The great fault with earth roads is that they are too flat and many times concave. Roads must be crowned sufficiently so that the water can quickly flow to the ditches on either side.

2. Under no circumstances should water be allowed to stand in the roadway or in the ditches as it will cause the wearing surface to become softened and the result will be ruts, holes and depressions.

3. Gravel or other material should always be spread. The act of dumping compacts the material in spots and leaves the spaces between in such condition that depressions are formed and a series of mud holes will be the result. It is essential that the road be brought to a uniform shape and crowned after the gravel or other material is spread by the use of a harrow or drag, so that the whole surface may be of uniform wearing strength. Spreading the gravel or other material, and the use of a harrow or drag, will prevent the rough appearance of many roads, which is caused by dumping one load in a place and raking off the top. (For information regarding drainage see pp. 480-485.)

4. In spreading gravel or other material, large stones should be removed by raking them out and placing them forward so as to be under the material next to be placed on the surface.

5. Ordinarily roads should be twenty-four feet in width between gutters or ditches, although there may be cases where in the judgment of the town superintendent it may be advisable to work the roads narrower, but in no case should the road be narrowed to an extent that vehicles cannot readily pass.

6. Special attention should be given to straightening the ditch line and under no circumstances should roads be surfaced or resurfaced with gravel, broken stone or other material unless great care is taken to straighten the road and avoid unnecessary crooks and turns.

### Removal of Refuse Matter.

All sod, loose stone and organic matter should be removed from the highway while the work is in progress. Under no circumstances should sod, roots, organic matter, worn-out dust or mud scraped from ditches or sides of the road, be placed on its surface.

### NOTES.

1. In using the road machine for grading and scraping, the work can be progressed faster and more economically by use of a steam roller or traction engine instead of teams, but in using the same for such work, great care should be exercised in procuring proper offsets so that power rollers and traction engines may be kept in the middle of the road in order that there may not be a tendency to narrow the road, thus causing secondary ditches or gutters.

2. Not less than three teams should be used with a road machine for grading and scraping as work of this character must be progressed fast enough so that the men employed in working the highways can occupy their time to the best advantage.

3. A drag or harrow should be attached to the road machine if steam power is used, but if teams are used, the road should be thoroughly dragged immediately following the road machine.

4. While the road machine for grading and scraping is being used, sufficient help should be provided by the employment of at least four or five laborers and an additional team with a wagon with a dump box, so that all of the loose stone, sod and organic matter found after the road has been thoroughly dragged, can be loaded into the wagon and hauled away.

5. The kind and class of labor employed is the most important item in the cost of the repair and improvement of highways and bridges and the energy of the town superintendent, who is the responsible head in the town, should be directed toward the utilization of all labor to the best advantage. The cost of proper road machinery, tools and implements may seem excessive, but it is really chargeable to the entire mileage of the town and to a term of years. It will therefore be seen that the expense apportioned to each mile or to each year is small.

6. Section 51 of the Highway Law provides that the town superintendent may with the approval of the town board purchase gravel or stone. The price of gravel in the bed or pit, or of stone in the fields or quarry is a small

item. It is the cost of excavating and quarrying, together with the cost of hauling to the road, the labor and teams in perfecting the drainage, grading and preparing the surface and putting the material in place that create the expense.

7. The painstaking and efficient town superintendent should understand the principles involved in highway construction and improvement; should have practical ideas and be capable of organizing and utilizing labor and teams to the best advantage.

8. *The town board should not object, but should exert every means to supply him with the best labor-saving machinery obtainable.*

### Noxious Weeds and Brush.

All noxious weeds growing within the bounds of the highway must be cut and removed at least twice each year, prior to the fifteenth day of July and to the fifteenth day of September, and all briars and brush must be cut once each year prior to the fifteenth day of September unless otherwise directed by the commission.

#### NOTES.

1. It is not necessary to serve notices upon owners and occupants of lands to cut and remove noxious weeds and brush. If notices are served, it is purely an act of courtesy on the part of the town superintendent. Should the town superintendent desire to serve notices upon owners and occupants of lands, they may use Form No. 12, p. 75.

2. If the owner or occupant of lands fails to comply with the provisions of section 54 of the Highway Law, the town superintendent must cause this work to be done within fifteen days after the first day of July and the first day of September of each year. (See Highway Law, § 47, subd. 7, p. 56.)

3. If property-owners abutting the highway are assessed and pay their taxes in an adjoining county or town, it is the duty of the town superintendent to proceed as required by section 47, subdivision 7, and assess the cost and make the proper returns to the town board of the town in the county in which the property is assessed and the taxes paid. (See Highway Law, § 55, subd. 2.)

4. The town superintendent should include in his estimate as provided by section 90, subdivision 4, an amount of money necessary to defray the advanced expense incurred in enforcing the provisions of section 54 of the Highway Law.

### Removal of Loose Stone.

All loose stone lying within the beaten track of every highway must be removed at least three times every year between the first day of April and the first day of December.

## NOTE.

1. Stone so removed must not be thrown into the gutter or the grass adjoining the highway, but shall be conveyed to some place from which the stone will not work back or be brought back into the beaten track. (See Highway Law, § 47, subd. 6, p. 55.)

**Where to Start Highway Work; Depressions.**

Highway work should start at the ditch or gutter on either side and continue to the center of the road.

All holes, ruts and depressions should be filled with the best available material and the town superintendent should be very careful to preserve the crown of the road so that the water can easily and quickly flow to the ditch on either side.

## NOTES.

1. This can be accomplished by the use of the road machine for grading and scraping or the drag and rut scrapers for smoothing and crowning the traveled portions of the highway. (See p. 508.)

2. A split-log drag can be made by splitting a log eight or nine feet in length and ten or twelve inches in diameter, in halves. These parts can be placed about thirty to thirty-six inches apart with the flat sides to the front, so that the sharp edges will act as scrapers. Two pieces of railroad rails of the same length fastened by iron rods, or a drag made by the use of hardwood timber would make a better and more durable drag. (See p. 509.)

3. To use these drags they should be hitched so that each drag or scraper will take a slant of forty-five degrees to the direction of the pull of the team. These drags are drawn over the road following storms and showers when the road is beginning to dry. Starting at the side and forcing the loose material into the ruts and toward the center, which keeps the road free from ruts, holes and depressions. (See subject-matter relative to this question, p. 508.)

4. It is a fundamental principle in the economical maintenance and care of roads of all kinds that repairs should be made as soon as signs of wear appear. When a rut or depression first appear, it should be filled. When a drain or culvert first becomes clogged, it should be freed from the obstruction. When the road commences to flatten out, it should be immediately recrowned by the use of new material. When stones work to the top or form a rough surface or roll loosely about, they should be immediately removed. In resurfacing or recrowning a road, or when ruts, holes or depressions are filled, the same class of road material should be used which constitutes the wearing surface of the road, viz.: if it is a clay road, use clay; if it is a gravel road, use gravel; if it is a broken stone road, use broken stone of the kind used in the construction of the top course.

5. A rough-rutted road wears out much more rapidly than a smooth one. When wagon wheel after wagon wheel, supporting a ton or more, sinks into a depression or drops from a stone protruding above the wheel track, the surface is soon cut through and serious injury to the road results. The work of a few minutes when repair is first needed will save many hours of work when neglected.

### Strength of Sluices, Culverts and Bridges.

In the repair and construction of all sluices, culverts and bridges having a span of five feet or less, the town superintendent should be very careful to so construct and repair the same, that they will be strong enough to carry a power roller or traction engine and they should always be constructed large enough to carry flood water quickly away.

#### NOTES.

1. In the construction of a culvert or sluice the discharge end should be the largest.

2. The length of all sluices or culverts should under no circumstances be less than the width of the road and they should be set low enough so that the traveled portion or surface of the road will be straight and smooth and form a perfect grade.

3. On grades, all sluices or culverts should be constructed diagonally across the road and not straight. (For information relative to proper construction of sluices and culverts, see pp. 485-491.)

4. Sluices and culverts of the wooden box type should not be constructed nor should tile be used for such purposes.

### Obstructions on State and County Highways.

All ditches, waterways and culverts on State and county highways must be kept free from obstructions at all times and all noxious weeds, brush and grass growing within the bounds of the highways and on the shoulders and in the ditches must be raked, cut and removed as provided by section 47, subdivision 7, and snow and ice must be removed from culverts and waterways so that in case of a thaw, the water may quickly flow from the road.

#### NOTES.

1. This suggestion is in accordance with the provisions of section 53 of the Highway Law.

2. The expense for the removal of obstructions from ditches, culverts and waterways of State and county highways, and also the expense for the removal of snow and ice from such culverts and waterways, must be paid from moneys levied and collected as provided by section 90, subdivision 1, and section 91 of the Highway Law.



3. The fact that a road has been constructed as a State or county highway and is to be maintained by the State does not relieve the town superintendent from the performance of his duty. There can be no temporary abandonment of an improved highway.

### Removal of Obstructions.

It is the duty of the town superintendent to cause the removal of all obstructions within the bounds of the State, county and town highways.

#### NOTES.

1. Owners and occupants of lands should be encouraged to preserve the trees by the roadside, but the town superintendent should not permit an excessive number of trees to stand, particularly so, where they cause too much shade and prevent the road from drying.

2. Branches of trees overhanging the highway so as to interfere with the public travel should not be permitted, and it is the duty of the town superintendent to either remove them or cause the same to be done.

3. The town superintendent must not permit the highways to be used for piling lumber, wood, logs or stones therein, and he must not allow machines, vehicles and implements to be abandoned or habitually placed therein. (See Highway Law, § 52, p. 66.)

### Repairs to Highways and Bridges.

The town superintendent must cause the highways and bridges to be kept in repair and free from obstruction and inspect the highways and bridges during the months of October and April of each year. (See Highway Law, § 47, subd. 2, p. 48.)

#### NOTES.

1. In making the inspection during the month of April, he should invite the supervisor and members of the town board who are interested in highway improvement to accompany him to such sections or portions of highways that, in his judgment, need special care and attention.

2. The April inspection should be made as early as possible in the month, so that proper directions may be given for the work being performed upon the various parts or sections.

3. The town superintendent should also invite the supervisor and members of the town board particularly interested in highway improvement to accompany him to those parts or sections which may need extra care and attention and to bridges which need extra repairs or reconstruction, when making his October inspection, as this inspection is made for the purpose of gaining information on which he should base his estimate in accordance with the provisions of section 90 of the Highway Law.

### Blank Forms.

Blank forms of orders, reports and accounts and blank books must be furnished by the commission, when in their judgment they are required for their convenience and also for the convenience of highway officers.

#### NOTES.

1. Should the blank forms furnished by the commission be bound in books with stub attachments, the stub attachments should be carefully filled in and retained by the town superintendent as a town record.

2. This is in accordance with the Highway Law which provides that the commission shall prescribe and furnish blank forms of orders to be used by the town superintendent and supervisor in keeping accounts of moneys received and paid out. (See Highway Law, § 18, p. 19).

### Collection of Penalties.

The town superintendent must collect or enforce the collection of all penalties.

#### NOTES.

1. He must assess the cost against owners and occupants for failure to remove obstructions and also for failure to cut and remove noxious weeds, briars, brush, shrubbery and other obstructions within the highway causing the drifting of snow. (See Highway Law, § 54, p. 74.)

2. He must assess the cost against telephone, telegraph, electrical railway and other electrical companies for failure to remove and reset telephone, telegraph, trolley and other poles and wires connected therewith when the same shall constitute an obstruction to the use of the highway by the traveling public. (See Highway Law, § 54, p. 74.)

3. He must enforce provisions of section 60 which relate to drainage, sewer and water pipes, cattle passes and other crossings in the highway.

4. He must enforce the collection of a penalty of ten dollars as fixed under the provisions of section 288, for the depositing and throwing loose stones in the gutters or grass adjoining the highway or for depositing or throwing upon the highway, ashes, papers, stones, sticks or other rubbish.

5. He must enforce the collection of treble damages for injury to any highway or bridge or for obstructing or diverting any creek, water-course or sluice, or for dragging logs or timber upon the surface of the highway or for the defacing or destroying of any mile-stone or guide-post erected in any highway, as provided for by section 290 of the Highway Law.

6. He should thoroughly enforce the provisions of section 204 of the Highway Law, which relates to injury to fruit or shade trees; section 295 of the Highway Law which relates to the cutting of trees so that they shall fall within the bounds of the highway, a river or stream; and section 296 which relates to the removal of trees which have fallen within the bounds of the highway.

7. Section 297 of the Highway Law provides that all penalties and forfeitures shall be recovered by the town superintendent in the name of the town in which the offense is committed.

### Working Plans.

It is the duty of the district or county superintendent to advise and direct town superintendents how best to repair, maintain and improve highways and bridges. (See Highway Law, § 33, subd. 2, p. 24.) The town superintendent should therefore not hesitate to request the district or county superintendent to furnish him with working plans for the improvement or repair of any highway or bridge and also to furnish him with a list of State and county highways to be constructed.

#### NOTES.

1. It is the duty of the town superintendent to carefully inspect State and county highways designated for improvement in the Spring and Fall of each year, and to mark or in some substantial manner indicate the portion of such designated highways which may need special care and attention in the preparation of plans, specifications and estimates. (See Highway Law, § 47, subd. 9.)

2. He should then carefully prepare recommendations in respect thereto and forward the same to the district or county superintendent. (See Highway Law, § 47, subd. 9.)

3. When the survey for such highway is being made the town superintendent should call the attention of the engineer in charge to the portions marked, which may need such special care and attention.

### Watering Troughs.

Section 65 of the Highway Law provides that watering troughs must be supplied with fresh water and that the surface of the same shall be three or more feet above the level of the ground and easily accessible for horses with vehicles, and that, when possible, such troughs shall be located on the lower side of the highway.

#### NOTES.

1. The town superintendent should be careful to note the location of watering troughs and to require the replacing and reconstruction of the same to comply with this section.

2. Watering troughs should be constructed high enough so that horses can be watered without the unchecking of a single or double team.

3. Watering troughs should always be on the lower side of the road excepting where the flow can be readily carried away either by an open ditch or by a culvert or sluice without injury to the surface.

4. Keep the water off the road, out of the road and away from the road.

### Approaches to Private Lands.

The town superintendent should insist upon the construction and repair of approaches to private lands, unless the town board takes appropriate action making the expense thereof a town charge.

#### NOTES.

1. Section 71 of the Highway Law provides that when directed by the town board the expense of construction and repair to approaches shall be a town charge; therefore the town superintendent should call the attention of the town board to this question at least once each year and should ask them to pass a proper resolution.

2. If the town board fails to take action, it is the duty of the town superintendent to strictly enforce the provisions of law and insist upon a full compliance on the part of the owner or occupant of lands. (See Highway Law, § 71, p. 98.)

### Not to Exceed Appropriations.

The town superintendent does not have the right or authority to exceed appropriations or to incur indebtedness which shall be binding upon the town.

#### NOTES.

1. If he exceeds his appropriation, the responsibility is his alone unless the electors of the town should see fit through the medium of a vote to provide means for his relief.

2. Sections 90 and 91 of the Highway Law provide means for furnishing him with a certain amount of money to be used for the purpose of administering the duties of his office. Section 90 of the Highway Law provides means for furnishing him with an additional amount of money.

3. If the town superintendent has, without the vote of the town, incurred a liability not provided for under the provisions of section 91 of the Highway Law, he must understand that the excess cannot be properly regarded as a town charge under section 80 of the Town Law.

4. He has no power or authority, except as provided by law, to bind the town by his individual contract or undertaking, and is individually responsible to those with whom he contracts, if any responsibility is thereby incurred. His various duties and obligations are explicitly defined by statute.

5. The Attorney-General, in an opinion under date of June 6, 1902, makes the following statement: "The provisions of the Highway Law heretofore referred to, providing a certain amount yearly, for the use of the highway commissioner (town superintendent), in caring for all highways and permitting the use of additional funds or the creation of additional expenses only for extraordinary repairs and emergencies, or after a vote of the people thereon, would become of no consequence or importance if the town board were to be regarded as obligated or given discretionary authority to relieve a highway commissioner (town superintendent) whenever he has exceeded his appropriations. A town board, therefore, has no authority to relieve a highway commissioner, who has, contrary to law, exceeded his appropriation."

### Storage of Tools, Implements and Machinery.

The town superintendent must provide a suitable place for housing and storing all machinery, tools and implements owned by the town and cause the same to be stored therein when not in use. (See Highway Law, § 49, p. 63.)

#### NOTES.

1. All road machines, steam rollers, stone crushers, tools and other implements owned by the town or by the highway districts must be cared for by him at the expense of the town, and his estimate, as provided for by section 90, subdivision 3, must include an amount necessary therefor.

2. The expense incurred for this purpose is a town charge, and must not be paid out of funds raised by taxes under the provisions of section 90, subdivision 1, or paid to the town under the provisions of section 103 of the Highway Law.

### Superintendent and Manager.

The town superintendent should understand that he is the superintendent or manager of highway and bridge improvement, repair and maintenance in his town.

#### NOTES.

1. It is his duty to organize his forces, give thorough instructions and direct the kind and class of work to be performed.

2. It is not desirable that a town superintendent should undertake to operate a road machine for grading and scraping or to take personal charge of a separate force of men, except in very small towns.

3. It may be difficult to secure the services of suitable men to operate road machines for grading and scraping, therefore he should carefully consider this fact where such conditions exist and make provisions therefor during the Winter and early Spring when he is organizing his forces.

### Adoption of Agreement.

The town board and the town superintendent constitute a board for the purpose of determining the places where and the manner in which moneys shall be expended. (See Highway Law, § 105, p. 156.)

#### NOTES.

1. The town clerk is a member of the town board and is also a member of this board and is entitled to a vote.

2. The town superintendent must not incur any liability or perform any work or cause the same to be done upon any highway until an agreement has been entered into and signed in duplicate by a majority of the board so constituted and until the agreement has been approved by the commission. (See Highway Law, § 105.)

### Expenditures.

The supervisor is the custodian of all highway and bridge moneys and pays out the same on the order of the town superintendent.

#### NOTES.

1. Bi-monthly pay days should be established, being the first Monday after the first and the first Monday after the fifteenth of each month.
2. The town superintendent when organizing his forces should have a perfect understanding with all employees to the effect that no payments shall be made except on pay days as established, and that payment shall be made by the supervisor, upon his written order.
3. All moneys must be paid out by the supervisor on the written order of the town superintendent, either in accordance with the agreement or after audit by the town board. (See Highway Law, §§ 105 and 106, p. 156.)
4. Payment for all material or supplies furnished by any person must be by the supervisor upon the written order of the town superintendent. Payments of the purchase price of machinery, tools and implements, bridges or parts of same, must be by the supervisor upon the written order of the town superintendent, after audit by the town board.

### Appointment of Deputy Town Superintendent.

A deputy town superintendent may be appointed by the town board to assist the town superintendent in the performance of his duties.

#### NOTES.

1. If the town superintendent desires an assistant he should, in writing, notify the town board of that fact and at the same time he may name the person he deems qualified.
2. The assistant thus selected and appointed by the town board can only act as such when his services may be required by the town superintendent.

### Compensation.

The town board must fix the compensation of the town superintendent and the deputy, if there be one, which shall not be less than two dollars and not more than five dollars per day.

#### NOTES.

1. The actual necessary expenses incurred by the town superintendent and his deputy, if there be one, in the performance of their duties, must be paid by the supervisor monthly in advance of audit from moneys levied and collected for such purposes. (See Highway Law, § 45, p. 42.)
2. The compensation of the town superintendent and his deputy, if there be one, and the expenses incurred by them, is a town charge. And none of the highway money annually raised by tax in the town for highway purposes or which the town receives as State aid as provided for by section 90, subdivision 1, section 91, 101, 103, can be used therefor.

### Reiterated Important Suggestions.

The town superintendent should organize his forces late in the Fall or early in the Spring. He should at that time examine all of the machinery, tools and implements for road work, and if they are not in proper repair and ready for use he should cause repairs to be made to the same at once.

If, in the judgment of the town superintendent, new machinery, tools and implements are required in order to properly carry on the work, he should include the same in his annual estimate as provided for by section 90, subdivision 3.

Parts of road machines for grading and scraping, ploughs and other implements, such as scraper blades, plough points, whiffletrees and other parts which are liable to break or wear, should be purchased and kept on hand at all times.

He should make arrangements for steam or other power, contract for teams, traction engine and power roller (see Highway Law, § 50) and also provide for the necessary labor to carry on the highway and bridge work of the town. It is absolutely necessary that this be done in order that there may be no delay in starting the highway work as soon as conditions in the Spring will permit.

In the organization of forces, men and teams should be employed, so far as possible, for the entire season's work. If teams are used on road machines for grading and scraping, if possible they should not be changed, as green teams will not and cannot be expected to perform the work with despatch, and it naturally follows that the services of experienced men are to be secured and retained.

After the forces are organized and when the work is about to begin, the town superintendent should notify the men employed that they will be paid semi-monthly, thereby establishing pay days on the Mondays after the first and the fifteenth of each month, or thereabout. After establishing these pay days, the town superintendent should, prior to such dates, carefully fill in the orders which he must make upon the supervisor as custodian. The order books and stub attachments, intact, should be submitted to the supervisor for his inspection and approval.

Town superintendents should not employ labor, teams or men by the day. The price therefor should be agreed upon by the hour, and the orders should be drawn in payment in accordance with the agreed and prevailing price per hour.

To the end that town superintendents may be more thoroughly informed, the following subject-matter, which is general in character, has been prepared and relates particularly to those subjects which may be of particular interest to such an officer, viz.: location and grades; drainage and foundation; surface drainage; side ditches; underdrains; culverts and short-span bridges; concrete; the use of I-beams in the construction of culverts and short-span bridges; surfacing of earth roads; the use of gravel or crushed stone for such purposes; repair and construction of earth roads; maintenance of gravel roads; maintenance of macadam roads; use of drags and road scrapers, etc.

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## SUGGESTIONS FOR THE GUIDANCE OF SUPERVISORS.

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### Estimates of Town Superintendent.

After the town superintendent has made his written statement or estimate as provided by section 90 of the Highway Law and after the town board, at its meeting on the Thursday succeeding general election, has approved, increased or reduced the estimate of the town superintendent, the supervisor should obtain his duplicate copy for presentation to the board of supervisors. (See Highway Law, § 91, p. 120.)

#### NOTES.

1. In October of each year the supervisor should accompany the town superintendent when on inspection thereof, or should, himself, personally inspect such highways or sections thereof, and bridges which in his judgment might need special attention. This will enable him to become familiar with the general condition of the highways and bridges within the town, to the end that he may be able to assist the town superintendent in making his annual statement or estimate.

2. The possession of this information would also enable him to make proper recommendations to the town board in relation to the approval or modification of such statement or estimate.



### Custodian.

The supervisor is the custodian of all moneys levied and collected as provided in the Highway Law. All moneys collected as penalties or received from any other source and available for highway, bridges and miscellaneous purposes, and all money received from the State under the provisions of section 103 of the Highway Law.

#### NOTES.

1. Before receiving such moneys, he must give a bond or an undertaking which must be approved by the town board.

2. The bond or undertaking shall be filed in the office of the town clerk and a certified copy of the same must be filed in the office of the county treasurer before any moneys received from the State as State aid can be paid to him, and a certified copy must also be filed in the office of the commission at Albany. (See Highway Law, § 104, p. 153; and for form of undertaking see Form No. 40.)

### Disbursements.

The supervisors should not under any circumstances disburse any moneys held by him for highways, bridge and miscellaneous purposes, except upon the written order of the town superintendent.

#### NOTES.

1. Under no circumstances should the supervisor honor or pay an order drawn upon him by the town superintendent for the improvement of the highways, sluices, culverts and bridges having a span of five feet or less until an agreement has been entered into by the town board and the town superintendent.

2. The supervisor should insist upon the establishment of a pay day and should honor or pay no orders except on said date.

3. The establishment of a pay day will greatly simplify his accounts and his work.

4. The supervisor and the town superintendent should by agreement arrange so that on a day prior to the established pay day, the town superintendent may submit his orders upon the supervisors to him for the inspection, and if the amount represented by such orders meets with his approval he may advance the amount thereof, and take a temporary receipt therefor. The temporary receipt must, of course, then be surrendered and returned to the town superintendent upon the due execution and delivery to the supervisor of the orders covered by such moneys so advanced. If the town superintendent should not be able to pay an order upon which he may have received an advance of money, and to obtain proper signature to the certificate thereto, he could then deliver the unexecuted order to the supervisor with the moneys represented thereby in accounting to him for the moneys thus advanced.

4. All moneys levied and collected or raised by the issue and sale of bonds or certificates of indebtedness, for purposes other than those for which an agreement is required, can only be paid out by the supervisor upon the written order of the town superintendent after audit of the town board.

5. Audits must be made on verified accounts presented to the town board at a regular or special meeting.

6. The supervisors should understand that no accounts can be audited or paid unless the expenditure be in accordance with the annual estimate of the town superintendent as provided for by sections 90 and 91 of the Highway Law or after authorization by the town board or by a vote of a town meeting. (See Highway Law, § 106, p. 160.)

### Supervisor's Report.

At the meeting of the town board held on the Thursday succeeding the general election, the supervisor must present his verified report (See Highway Law, § 107, subs. 1, 2, 3, 4 and 5, p. 164.)

#### NOTES.

1. It will be noted that the form of the report must be prescribed by the commission.

2. The report must be filed in the office of the town clerk within three days thereafter and be subject to the public inspection during the office hours of the town clerk.

3. Within three days after the presentation of the report, a duplicate copy must be mailed to the commission at Albany. A failure to file a duplicate copy of the supervisors' report to the commission might be regarded by the commission or the Comptroller as a breach of contract, and such being the case, it would be very questionable whether the moneys otherwise due from the State under the provisions of sections 100 and 103 could rightfully be paid.

4. A certified copy of the report must also be filed with the clerk of the board of supervisors in order that he may be able to cause the same to be printed in the annual proceedings of the board.

5. A certified copy of the report must be published in the newspaper published in the town, or if there be more published therein, then in a newspaper published within the county. (See Highway Law, § 107.)

6. It should be noticed that it is the intent of the law to emphasize the importance of publicity in the locality as to the condition of the highway finances.

### Uniform System of Town Accounts.

The supervisor will notice that the commission must prescribe the method of keeping town accounts showing the moneys received and expended for highways, bridges, purchase, hire or repair of machinery, tools and implements, the removal of obstructions caused by snow and miscellaneous purposes which shall be uniform, so far as practicable, throughout the State.

## NOTES.

1. The blank forms of orders used by the town superintendent in making an order upon the supervisor must be those prescribed by the commission.
2. The accounts must be kept in the method prescribed and such blanks as prescribed by the commission must be used.
3. All orders and records of accounts must be filed in the office of the town clerk, and preserved as part of the town record.
4. The supervisor, town clerk and town superintendent must produce all records and accounts for examination and inspection at any time on the demand of a representative of the commission. (See Highway Law, § 19, p. 20.)

**Compensation of Supervisor.**

It is the duty of the town board to fix the compensation of the supervisor and such compensation must be a town charge (See Highway Law, § 110, p. 168.)

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**SUGGESTIONS FOR THE GUIDANCE OF TOWN CLERKS.****List of Town Officers.**

It is the duty of the town clerk to prepare and forward to the commission, prior to the fifteenth day of December in each year, a complete list showing the names of the supervisor, town superintendent, town clerk, assessors, collector and justices of the peace. (See Highway Law, § 109, p. 168.)

## NOTES.

1. The list must show the postoffice addresses of each and the date of the appointment or election, and the expiration of the term of office. (See Highway Law, § 109, p. 168.)
2. In preparing such list, the town clerk should be very careful to furnish the full Christian name of each officer, and should be very particular to thoroughly inform himself as to the actual postoffice addresses, so that there may be no unnecessary delay in transmission of mail or other matters to each individual by the commission.
3. The failure on the part of the town clerk to furnish this information might be regarded by the commission or comptroller as a breach of contract, and might be made a cause for withholding the moneys otherwise due the town from the state, as provided for by sections 101 and 103 of the Highway Law (p. 150, 153).

### A Member of the Town Board.

The town clerk under the provisions of the Town Law is a member of the town board. (See Town Law, § 160.)

#### NOTES.

1. The board for the purpose of determining the places where and manner in which moneys for highway and bridge purposes are to be expended is constituted as follows, viz.: The supervisor, town clerk, justices of the peace and town superintendent.

2. An agreement for the expenditures of money for the repair and improvement of the town highways, as provided in section 105, must be entered into and signed in duplicate by a majority of the members of the board so constituted.

3. The town clerk must preserve one copy of such agreement as a town record and forward one copy to the district or county superintendent.

4. It is suggested that the agreement be signed in triplicate, although the law does not so provide, so that the town clerk may forward a copy of the same to the commission for approval, as the law provides that the agreement must be approved by the commission. (See Highway Law, § 105, p. 156.)

### Compensation of Town Clerk.

It is the duty of the town board to fix the compensation of the town clerk for his services under the Highway Law and such compensation must be a town charge. (See Highway Law, § 110, p. 168.)

#### NOTES.

1. The duties imposed upon him by the Highway Law include the following:
  - 1st. To transmit to the commission, annually, the names and post-office addresses of all of the town officers. (See Highway Law, § 109, p. 168.)
  - 2d. To carefully preserve all orders and records of accounts as town records. (See Highway Law, § 108, p. 167.)
  - 3d. To receive the annual report of the supervisor, showing the receipts and disbursements for highway, bridges and miscellaneous purposes, and also an inventory of machinery, tools and implements, and to keep the same open to the public inspection during office hours.
  - 4th. In case of removal of a town superintendent all written charges preferred must be made in duplicate, one of which shall be filed in the office of the town clerk and the other served by him personally upon the town superintendent.
  - 5th. Notices of appeal in case of charges are to be filed and preserved, and a copy of such notice of appeal must be served personally by the town clerk and a copy of the order of the court shall be entered and preserved as a town record.

- 6th. A list of names of persons employed, with the compensation paid to each and the capacity in which they are employed, must be filed in the office of the town clerk. (See Highway Law, § 47, subd. 4, p. 53.)
  - 7th. All bids for contracts and contracts awarded must be filed in the office of the town clerk. (See Highway Law, § 48, p. 61.)
  - 8th. The town superintendent must file in the office of the town clerk his written recommendations as to what machinery, tools and implements should be purchased for the use of the town. (See Highway Law, § 49, p. 63.)
  - 9th. An order with a map or diagram showing the location of sidewalks and trees, certified to by the town superintendent, shall be filed. (See Highway Law, § 61, p. 87.)
  - 10th. He shall file the report of the town superintendent showing the mileage of highways, as provided by Highway Law, § 69, p. 97.
  - 11th. Certificates issued by the district or county superintendent, relative to the closing of highways during repair and construction, must be filed. (See Highway Law, § 77, p. 114.)
  - 12th. Estimates of town superintendents must be filed. (See Highway Law, § 90, p. 116.)
  - 13th. The action of the town board in relation to estimates must be filed. (See Highway Law, § 91, p. 120.)
  - 14th. The town clerk will prepare a statement showing probable cost of improvement and repair of highways and repair and construction of bridges, which must be filed in his office. (See Highway Law, § 93, p. 128.)
  - 15th. It is the duty of the town clerk to call special meeting as provided by Highway Law, § 95, p. 135.
  - 16th. A proposition in the shape of an application to borrow money must be certified to by the town clerk. (See Highway Law, § 97, p. 138.)
  - 17th. Bonds for the faithful disbursements, safe-keeping and accounting of moneys are to be filed in the office of the town clerk. (See Highway Law, § 104, p. 153.)
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## SUGGESTIONS FOR THE GUIDANCE OF COUNTY TREASURERS, CLERKS OF BOARDS OF SUPERVISORS.

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### State Aid Payable to County Treasurer.

The amount of the State aid to be paid to each of the towns of each county of the State must be paid to the county treasurer by the State Treasurer upon a warrant drawn by the Comptroller in favor of the county treasurer.

## NOTES.

1. The county treasurer will be furnished by the Comptroller with a statement showing the amount to be paid to each town in the county.

2. After the supervisor of a town has filed a certified copy of his undertakings, it is then the duty of the county treasurer to pay to the supervisor the amount due the town he represents.

**Custodian of Maintenance Funds.**

The county treasurer is the custodian of all moneys collected by tax in the towns of the county and all moneys paid by the State for the maintenance of State and county highways.

## NOTES.

1. Each town of the county must pay to the county treasurer, for the maintenance and repair of State and county highways, the sum of fifty dollars for each mile, or major fraction of a mile, of both State and county highways within the town. (See Highway Law, § 172, p. 224.)

2. The county treasurer should procure, from either the clerk of the board of supervisors or the county clerk, a copy of the statement furnished by the Comptroller specifying the number of miles of State and county highways in each town, so that he may know that the amounts of money, when collected from the several towns and paid to him, are correct.

3. All moneys received from the towns and the State on account of the maintenance of State and county highways should be deposited by him to the credit of a fund for such maintenance. (See Highway Law, § 172, p. 224.)

**Disbursements of Maintenance Funds.**

Moneys for the maintenance of State and county highways must be made upon the written order of the commission. (See Highway Law, § 173, p. 225.)

**Reports of the County Treasurer.**

The county treasurer shall report to the commission monthly, or oftener, if required, the amount received by him on account of the maintenance and repair of the State and county highways and the expenditures made out of such moneys. (See Highway Law, § 174, p. 226.)

## NOTE.

1. The form and contents of reports by the county treasurer must be prescribed by the commission.

**Statement by Clerk of Board of Supervisors.**

It is the duty of the clerk of the board of supervisors to transmit to the State Comptroller and the commission, prior to the first

day of January of each year, a statement as provided by section 100 of the Highway Law.

#### NOTES.

1. The particular attention of clerks of boards of supervisors is called to the fact that section 15, subdivision 7, of the Highway Law requires the commission to make an annual report to the Legislature on or before the fifteenth day of February in each year. It is therefore necessary that the clerk's statement should be received prior to the date specified.

2. Delay on the part of the clerks of boards of supervisors in transmitting their statement to the Comptroller causes delay in transmission of State aid due the towns for the maintenance, repair and improvement of town highways.

#### Publication of Supervisors' Reports.

It is the duty of the supervisor to file a certified copy of his statement as provided for by section 107 of the Highway Law, and it is the duty of the clerk of the board of supervisors to cause such statements to be printed in the next issue of the annual proceedings of the board of supervisors.

#### Proceedings of the Board to be Forwarded to the Comptroller and Commission.

It is the duty of the clerk of the board of supervisors to forward, as soon as possible, three copies of the proceedings of the board of supervisors to the commission and also three copies to the Comptroller.

#### Duties of Assessors.

The particular attention of assessors of the towns of the State is called to the fact that they must indicate in a separate column the value of real and personal property in incorporated villages.

#### NOTE.

1. Section 35 of the Tax Law provides that the assessors shall complete the assessment-roll on or before the first day of August, and their particular attention is called to the fact that in completing their roll prior to the section 99 of the Highway Law, and with § 21 of the Tax Law as amended by L. 1908, ch. 437.

## INFORMATION FOR THE GUIDANCE OF DISTRICT AND COUNTY SUPERINTENDENTS.

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### General Charge.

The district or county superintendent under the provision of section 33, subdivision 1, of the Highway Law must have general charge of all highways or bridges within his district or county and see that the same are improved, repaired and maintained in a proper manner.

### NOTES.

1. The commission in accordance with section 15, subdivision 2, may prescribe rules and regulations for the guidance of district and county superintendents.

2. It is the intent of the law that the district and county superintendents' jurisdiction shall extend over town highways, and in case of the construction of a county highway the board of supervisors may direct him to inspect the same during the construction and to certify to the board the progress of the work and to report to the commission any irregularities of the contractor or any failure on his part to comply with the terms of the contract.

3. It is not the intent of the law that the district or county superintendent should have any power to direct or to in any manner interfere with the division or resident engineers or any engineer, inspector, leveler, rodman or any employee placed in charge of the construction of State and county highways either by the commission or the division engineer, nor should he undertake to advise or direct the contractor in the performance of his work, it being his duty simply to report as to his findings only.

4. The commission, in accordance with the provisions of section 15, subdivision 2, may prescribe rules and regulations for the guidance of district and county superintendents which may grant them powers to perform supervisory and directory duties relative to the construction and repair of State and county highways.

### Inspection of Highways and Bridges.

It is the duty of the district and county superintendents to inspect the highways and bridges of each town in his district or county and to advise and direct town superintendents. (See Highway Law, § 33, subd. 2, p. 24.)

### Examination of Deposits of Gravel and Stone.

It is the duty of the district and county superintendent to examine the various formations and deposits of gravel and stone in



his district and county, for the purpose of ascertaining the materials which are best available and suitable for the improvement of the highways therein. (See Highway Law, § 33, subd. 3, p. 24.)

NOTE.

1. The district and county superintendent should carefully preserve samples of such formation and deposit, together with a record showing the location of the same. This should be done so that he may be able to submit samples to the commission for approval when requested so to do.

### Establishments of Grades.

It is the duty of the district and county superintendent to establish all grades and to recommend means of drainage repairs and improvements to the town superintendent or the town board. (See Highway Law, § 33, subd. 4, p. 24.)

NOTE.

1. If the district or county superintendent should not be a practical civil engineer, the commissioner may, by rules and regulations, direct the division engineer to furnish him with plans, specifications and necessary information.

### Erection and Repair of Bridges.

It is the duty of the district and county superintendent to approve plans, specifications and estimates for the erection and repair of bridges and the construction and maintenance of town highways. See Highway Law, § 33, subd. 5, p. 24.)

NOTE.

1. Should the district or county superintendent not be a practical civil engineer, plans and specifications may be furnished him by the division engineer, in accordance with rules and regulations of the commission.

### Reports.

It is the duty of the district or county superintendent to report to the commission annually on or before November fifteenth in each year.

## GENERAL SUGGESTIONS RELATIVE TO THE IMPROVEMENT AND REPAIR OF HIGHWAYS.

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A country road should be thoroughly drained in order that it may be kept dry; the best available material should be used; great care should be taken to keep the surface smooth and free from ruts and depressions, and efforts should be made to reduce steep grades by cutting off the top of each hill and filling in at the bottom.

Those who drive over a road can easily discover whether it is a good one and whether proper care and attention has been given in carrying out the suggestions for the guidance of town superintendents.

A good road must be kept dry, and in order to keep it dry, after proper attention has been given to drainage, the crown must be preserved and all depressions filled so that it will not become water-soaked; at no time should any part be allowed to remain in such a condition that it will retain water on its surface.

The improvement, repair and proper maintenance of our wagon roads may be considered under three heads, viz.: location and grades, drainage and foundation, and surfacing.

### Location and Grades.

One of the greatest defects and often one of the most expensive to remedy is a faulty location. Many of the New York State roads are built over the tops of the highest hills and down into and out of the deepest valleys, most of which could have been avoided had the roads been properly located when first laid out.

Of course with a faulty location we have many steep grades that limit the load that can be moved over the better portions of a road between steep grades. A chain is "no stronger than its weakest link," and the load from farm to market is limited by the steepest grade or poorest road over which it has to be carried. The steeper the hill the smaller the load that can be moved by the same amount of power.



HIGHWAY, BEFORE AND AFTER IMPROVEMENT.





HIGHWAY, BEFORE AND AFTER IMPROVEMENT.





HIGHWAY, BEFORE AND AFTER IMPROVEMENT.







HIGHWAY, BEFORE AND AFTER IMPROVEMENT.



Accurate tests have shown that a horse which can pull on a level road 1,000 pounds, on a rise of

1 foot in 100 feet	can draw only 900 pounds
1 foot in 50 feet	can draw only 810 pounds
1 foot in 44 feet	can draw only 750 pounds
1 foot in 40 feet	can draw only 720 pounds
1 foot in 30 feet	can draw only 640 pounds
1 foot in 25 feet	can draw only 540 pounds
1 foot in 24 feet	can draw only 500 pounds
1 foot in 20 feet,	can draw only 400 pounds
1 foot in 10 feet	can draw only 250 pounds

A road with steep grades is usually difficult and expensive to maintain, as the surface water has a greater velocity down the steep grades and often seriously damages the road way and ditches during heavy rainstorms.

In a great many cases the location of the road may be improved by placing it where soil conditions for drainage and surfacing are better, avoiding swamps where the soil may consist of vegetable matter or be otherwise unsuitable. Thus the cost of maintenance may often be reduced by an improved location. Again the unnecessary crossing of hill, valley, swamp, stream or railroad may frequently be avoided by giving the road a new location.

The steep grades on our country highways should be eliminated as fast as the means available will permit, starting with those that are steepest and which are situated on those roads having the heaviest travel. If the grades cannot be reduced to a five, six or seven foot rise in one hundred feet horizontally, with a moderate amount of excavation at the top and an embankment at the foot of a hill, it is then wiser to seek a new location and go around instead of over, remembering the old saying that "the bale of a bucket is no longer when it is horizontal, than in a vertical position." If possible each steep grade should be reduced to the permanent maximum grade decided on by the commission, division engineer or the district or county superintendent with a permanent drainage plan and a proper surface provided. If the grade is only reduced a small amount year after year, as is the common

practice, the roadway is annually torn up and made impassable for public use.

A proper drainage plan is as essential on a hill as elsewhere. *The water should be turned away from the road at the top of the hill, and as frequently as possible led out of the ditch before the bottom is reached, by the building of proper culverts or sluices.* The practice of carrying water long distances in the ditches allows it to accumulate in sufficient quantities to damage the road and ditches during and after heavy rainstorms. Provision should be made for the disposal of water from the roadside ditches by carrying it through private property with necessary drains wherever an opportunity exists. (See Highway Law, § 57, subd. 1, p. 80.)

The crown of a road on a hill should be somewhat greater than on the level in order that the water may be carried to the ditches quicker, and should not be allowed to run down the hill lengthwise of the road following the wheel tracks, thus causing ruts.

The benefits of an improved location will be enjoyed at all seasons of the year, by all persons and by future generations.

### **Drainage and Foundation.**

One of the most important subjects involved in the maintenance of an earth, gravel, or macadam highway is that of drainage. Water is the natural enemy of any road.

Three systems are used in the proper drainage of a road: surface drainage, side ditches, and underdrains.

### **Surface Drainage.**

In forming the surface great care should be taken to keep the road well crowned so that the water will quickly run into the side ditches. Underdrains are usually of no use in draining the surface, for, in order to reach them, the water must first soften, and then soak through. The crown should not be so great that vehicles are compelled to keep in the center, as in that case the road will be worn hollow and surface water will be retained. In extreme cases of too much crowning it is usually difficult for vehicles to pass. Provided the road is properly maintained and the surface is kept smooth, a crown of little or more than one inch to one foot

is ample. More crown is required on very steep grades, as the water in flowing from the center of the road to the sides travels diagonally and not at right angles to the center line, as is the case on a level road. If the surface is too flat, the water will follow down the center, the wheel track will become deepened, stones become loosened and the road surface made rough and dangerous. It should be remembered that surface drainage depends largely on maintenance, and that in order to get the best results the surface should be kept smooth and free from ruts, holes and depressions.

### Side Ditches.

One of the principal causes of the poor condition of the ordinary earth road is the lack of proper side ditches. These ditches serve to carry the surface water from the road and also to intercept the water from the adjacent side hills. In places where no tile drains are laid, the ditches also serve to drain the subgrade to a certain extent although a tile drain is much more effective for this purpose. If there are proper underdrains there is no necessity for very deep side ditches. The side ditches should be so formed that nearly all the rough work can be done by road machines for grading and scraping, and care should be taken to make the slopes on the roadside gradual enough to avoid accident to a vehicle should it be crowded off the traveled way. To be effective, the side ditches must be dug to a uniform grade, and should have an unobstructed outlet at proper intervals, into some stream if possible. Water should never be allowed to stand in the ditches to evaporate, but should be quickly carried away from the road. It should be thoroughly understood that it is inadvisable to carry water long distances, as damage from washing and scouring is sure to occur after a thaw or heavy shower. The ditches should discharge as soon as possible into the natural watercourses. It is necessary to lead the water from the high to the low side of the road at proper intervals, and in doing so it is a common practice especially on steep grades, to dig a gutter or to build diagonally across the road a small dam, commonly called a "Thank you Ma'am." This practice is objectionable and should never be adopted. The water should always be carried under the roadbed by means of culverts or sluices and the size must be determined

by the flood of water to be carried and by the fall in the culvert. Stone or concrete box-culverts are superior to pipe for this purpose as they are less liable to freeze or to become clogged or damaged and are more easily cleaned. Stone flagging or concrete slabs, supported by steel I-beams or rails, should be used in preference to plank for covering culverts having less than eight or ten feet span.

### Underdrains.

Underdrains should be placed in soil in which there is no underdrainage; that is, in any soil in which water lies in the ground at a depth of from three to five feet or less, below the surface. Generally speaking, money cannot be spent to a better advantage than in properly underdraining a road built on clay or loamy soil. There is a mistaken idea that the principal function of underdrainage is to carry off the surface water. *The most important objects of underdrainage are, first, to lower the water level in the soil; and second, to dry the ground quickly.* The surface of the road is quickly dried by the sun and wind; but if the foundation is wet and soft, the roadbed becomes porous and ruts are soon formed and are filled with water by the first shower.

Underdrains are also of great value in intercepting and carrying off the water below the surface, after a freeze and thaw. In the Spring, especially when the water below the road is released by thawing, the underdrains quickly carry it off and the foundation is left dry and firm. *Frost is harmless to a road where there is no water beneath it,* and by keeping the foundation dry the road is prevented from being broken up in the Spring.

Porous drain tiles, or vitrified pipe, six inches in diameter and laid from three to four feet below the surface, make the best form of drainage. The porous tile, which usually comes in lengths of about thirteen inches, should be uniformly burned straight, round and smooth inside. The tile underdrain is better and more durable than any of the substitutes commonly in use, such as wooden box drains or open ditches filled with broken stone or logs and brush.

If the porous tiles have no hubs or collars to help hold them in place, care should be taken to keep the bottom of the trench but a

little wider than the diameter of the pipes, or better still, a groove may be scooped out in the bottom of the trench to fit the tiles, which should be laid with their ends in contact with reasonably close joints. It is the general practice to wrap a piece of cloth, canvas or burlap around each joint to prevent fine particles of earth from being washed in at the joints.

If there are sags in a line of pipe, silt will accumulate at these points, retarding, and finally stopping the flow of water. It is therefore important that the tiles should be laid to a true grade, especially if the fall is slight, and they should be also laid in line both vertically and horizontally. It is not considered good practice to lay underdrains on a less grade than two inches to one hundred feet, or wherever the sub-soil is very unstable, there must be laid in the bottom of the trench, as a foundation for the tiles, boards one inch thick, three or four inches wide, and twelve or more feet long, the ends being joined by nailing them to pieces beneath them. Tile is very effective when laid in this manner, and nearly level; but in this case it is advisable to use a larger diameter of pipe at the outlet and to gradually decrease the diameter as the distance from the outlet increases in order to increase the fall.

It is often advisable to start the pipe line at a depth of four and one-half feet and to gradually increase the depth from four and one-half to five feet provided there is a good outlet at the deeper end. It is important, in any case, that the drain have a good unobstructed outlet and that the end of the tile be protected by masonry or other means. It is customary to substitute at the exposed end, three or four length of vitrified pipe for the porous tile, as the end tiles soon become destroyed if left exposed to the elements. After the tile has been properly laid, it should be covered with at least a foot of broken stone, or clean gravel or cinders placed over and around it. The trench should then be filled with stone or the most porous material available.

*It is better to place the underdrain under the side ditch or ditches, rather than under the center of the road.* While a tile drain under the center of the road may be more effective, yet the one placed under the ditch at the same elevation costs less to dig the trench, since it necessarily makes less excavation. There is also

a liability of the material in the trench settling, therefore, if under the center of the road, it will result in depressions, ruts and mud-holes. If, for any reason, the tile placed under the middle of the road becomes stopped up, it is not only more expensive to dig it up but also the repairs interfere with traffic.

It is generally conceded that a line of tile of proper size placed under one side ditch at a depth of from three to four feet will give sufficient drainage, under ordinary circumstances. Local conditions, however, may make it necessary to lay two lines of tile, as when the drains are laid very shallow, on account of hard pan appearing near the surface, or when the first line put in has proved to be too small, or is poorly laid. If the ground on one side is higher than on the other, the tile should be laid on the higher side so that any water coming down the slope under the surface will be intercepted. The tile should always be laid so that it will take the water from any springs or small swamps adjacent to the road, as it is much better to drain these places than to raise the road above them, by filling them in with earth. If any doubt exists as to whether one or two lines of tile is needed, it is a good plan to put the one line first and observe whether both sides of the road appear to be equally dry, and if not, the other line can be added if found necessary.

### **Importance of Drainage.**

The question of drainage is of the greatest importance in road construction. The town superintendent must bear in mind that the great secret of success in maintaining the roads of a town is in keeping the water out of the road, off the road and away from the road. If the water is permitted to seep into or underneath the road, the foundation will, sooner or later, become porous, leaving honeycombed spaces or spots. In such places the road will break through or water-pockets be formed under the wear of traffic, or else in cold weather it will freeze and in the Spring when the frost is coming out of the ground, such places will become almost impassable.

The town superintendent should carefully study the local conditions and determine the necessary size or capacity of the ditches, culverts and sluices, in order that the maximum amount of storm water will readily be carried away, and they should be very par-



ticular to keep the side ditches, culverts and sluices free and clear of all obstructions.

The grades of the ditches should be uniform to their outlet or as nearly uniform as conditions will permit, and the outlets should be as free as possible

Water conveyed long distances increases in volume, and as it increases in volume, it becomes more and more destructive. Great care should be taken to straighten the ditch line, and it should neither be too deep nor too narrow, for a deep ditch with perpendicular banks is dangerous to traffic and difficult to maintain. Ditches should be kept clear of weeds and dirt, and in the Fall the town superintendent should be careful to remove all weeds, dirt and leaves which have accumulated.

The town superintendent should not hesitate to blast out rocks in order that the ditch line may be straightened. Under no circumstances should a ditch be constructed around a rock boulder except in cases where the water is led away from the beaten track of the highway.

Section 57, subdivision 1, of the Highway Law provides that a town superintendent may, when directed by the district or county superintendent and when authorized by the town board, enter upon any lands adjacent to any highways for the purpose of opening any existing ditch or drain, or digging a new ditch for the free passage of water for the purpose of draining such highway.

The Attorney-General has held that under the Highway Law it is the duty of the town superintendent to keep the highways of a town in repair, and if to accomplish such purpose it becomes necessary to construct a ditch or a drain within the bounds of the highway in order to get the water out of the road, the superintendent has the power to do so. It therefore follows that a ditch necessarily constructed for drainage purposes is a part of the highway, and, as provided by law, the owner of the adjacent premises has no right to fill up the ditch in such a manner as to obstruct or interfere with the purpose for which it was made.

### Culverts and Short-Span Bridges.

Stone or concrete box culverts are superior to pipe as they are less liable to freeze and become clogged, broken or damaged

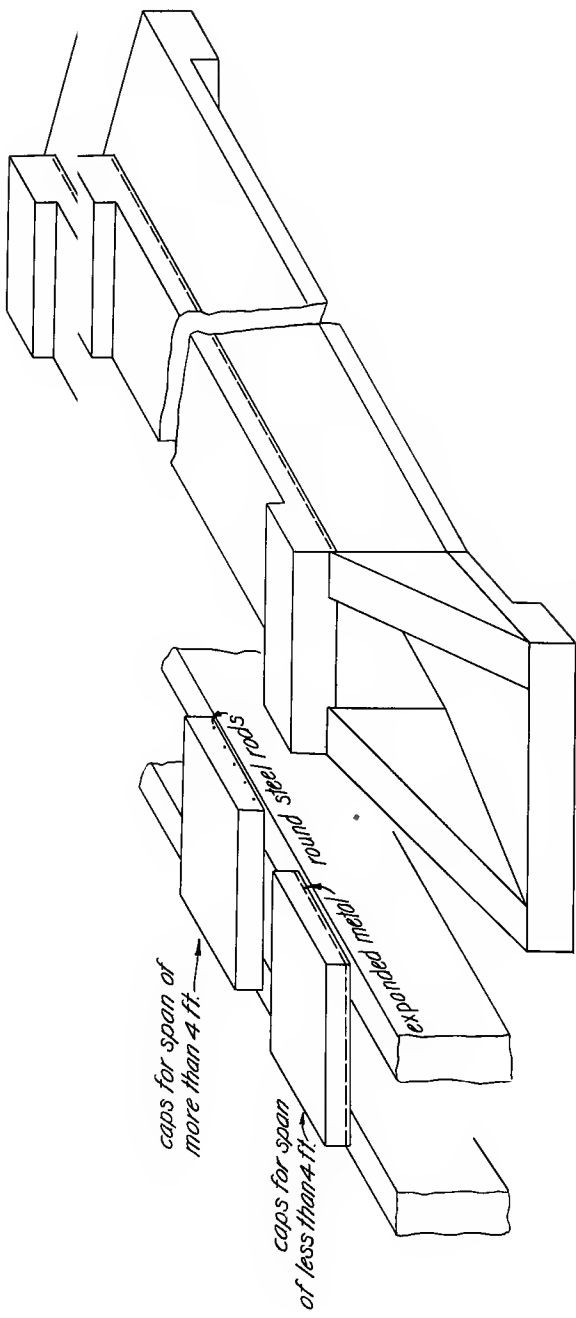
and are more easily cleaned. Culverts of the wooden-box type should not be constructed nor should tile be used for such purposes. A culvert which can be constructed by the use of concrete without skilled labor is shown by drawings on opposite page. Culverts of this character cost more to build than one constructed with dry masonry walls and a plank top, but they are more economical because no repairs are necessary when they have been properly built.

Town superintendents should observe the following directions and suggestions, relative to the methods of mixing the proportions of ingredients to be used, which are as follows:

Provide a mixing-bed about eight feet wide and ten feet long, formed of smooth boards laid close, or of sheet iron. Never mix mortar or concrete on the ground.

To make concrete, use one part loose Portland cement, two and one-half parts sand, and five parts broken stone or gravel, not exceeding one inch in size, all being measured in loose bulk. If stone from a crusher is used, screen out the fragments larger than one inch in size, and use for the concrete all the products less than one inch allowing the dust to act instead of one part sand. If gravel is to be used and is not clean, it should be washed in running water until the water runs away clear. Thoroughly mix the cement and the proper amount of sand before wetting; then add enough water to make a thin mortar but not thin enough to run; dampen the broken stone or gravel and then spread the proper quantity of the broken stone dampened, or gravel, upon the mixing-bed, in a four-inch layer, and cover it with the mortar; mix thoroughly by turning with shovels, while working with hoes until all fragments are coated with the mortar. The mass thus formed should flatten and quake when put into a wheelbarrow or pail, but should not be fluid.

After the excavation has been made the first thing to do is to lay out the outside line of the culvert and build a box inclosure by means of stakes and boards shown by the drawing opposite page 448. The forms shown in the sketch are composed of one-inch boards, planed on one side, and two-by-fours. The boards should be braced in the manner shown to prevent bulging. The forms for the wings may be the forms for the side walls extended. The



**CONCRETE CULVERT.**



excavation for the head walls should extend from eighteen to thirty inches below the bottom of the culvert to make a cut-off wall. This cut-off wall at each end prevents water from washing under the culvert and destroying it by undermining. After the outside forms are constructed grade the bottom so that it will have a fall of not less than three inches in a culvert which is to be twenty feet long. Then mix the concrete and put in the bottom of the culvert for the whole length, being careful to keep the grade uniform.

Concrete should not cost more than five or six dollars per cubic yard.

2x2x20 feet long will contain 7.6 cubic yards.

2x3x20 feet long will contain 8.9 cubic yards.

3x3x20 feet long will contain 12.8 cubic yards.

For each additional foot in length add to the above quantities:

For 2x2—.31 cubic yard.

For 2x3—.37 cubic yard.

For 3x3—.49 cubic yard.

TABLE OF DIMENSIONS FOR CONCRETE CULVERTS.

Size of opening (or span).	Thickness of sidewalls	Thickness of top.	Reinforcement.	Distance of reinforcement from bottom.
Two feet ....	12"	6"	expanded metal	1"
Three feet ...	18"	8"	expanded metal	1"
Four feet ....	18"	10"	expanded metal	1 1-2"
Five feet ....	18"	12"	1" steel rods	1 1-2"
Six feet .....	18" at top	12"	1" steel rods	1 1-2"

Note—Half-inch steel rods may be used instead of expanded metal. Expanded metal should be No. 4 gauge.

The town superintendent may obtain from the district or county superintendent, the division engineer or the commission, free of charge, standard plans for culverts and small bridges which are used in the construction of State and county highways.

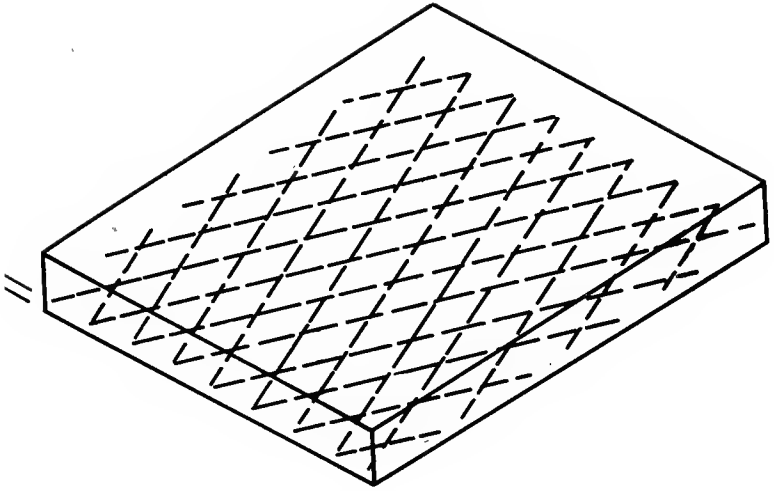
### Concrete Slab.

Stone flagging or concrete slabs, supported by steel I-beams or rails, should be used in preference to plank for culverts having less than eight to ten feet span, and in the construction of culverts and bridges great care should be taken to provide a culvert of sufficient strength to support safely a twelve-ton steam roller.

Concrete slabs can be made in the following manner, viz.:

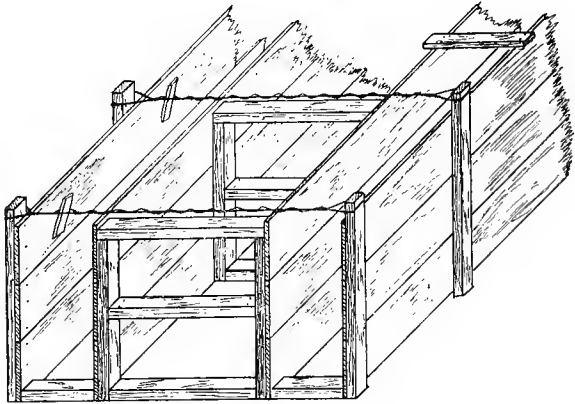
Provide a mixing bed about eight feet wide and ten feet long, formed of smooth boards laid close, or of sheet iron. Never mix mortar or concrete on the ground. Make an open box, six inches deep, two or three feet wide and from three and one-half to four and one-half feet in length as the span may require. Whenever the necessary width of opening exceeds three feet, I-beams of steel must be used to span it, and these must be placed two or three feet between centers, this distance varying inversely with the width, and the slabs made to span this distance between the center of the beams. Provide expanded metal of gauge No. 4, formed of steel 3-16 inch thick, 5-16 inch wide in meshes 6 inches wide, and 12 inches long, and weighing 1 1-10 pounds per square foot, and costing five cents per pound, and cut into sheet of sufficient size to nearly cover the proposed slab, being careful that the 12-inch mesh crosses the span.

To make the concrete use one part loose Portland cement, two and one-half parts sand and five parts broken stone or gravel not exceeding one inch in size, all being measured in loose bulk. If stone from a crusher is used, screen out the fragments larger than one inch in size and use for the concrete all the products less than one inch allowing the dust to act instead of one part of the sand. If gravel is to be used and is not clean, it should be washed in running water, until the water runs away clear. Thoroughly mix the cement and the proper amount of sand before wetting; then add enough water to make a thin mortar which is not thin enough to run, dampen the broken stone or gravel, and then spread the proper quantity of the broken stone or gravel dampened upon the mixing bed in a four-inch layer and cover it with the mortar; mix thoroughly by turning with shovels, while working with the hoes, until all fragments are coated with the mortar. The mass thus formed should flatten and quake when put into a wheelbarrow



*Dimensions vary with size of Culvert.*

## **CONCRETE SLAB.**



*SKETCH OF FORMS FOR BOX CULVERT.*





or pail, but should not be fluid. Spread over the bottom of the box a coat of mortar followed by a coat of fine concrete, making a layer of 1 1-4 inches thick, after ramming, and upon this lay the sheet of expanded and embed it in the soft concrete by ramming, using care that the 12-inch length of mesh lies with the length of the span of the slab when it shall be put on the culvert. Fill the box, working the stones from the side with a trowel, so that the edge will have a smooth surface; ram thoroughly until no stones nor gravel can be seen and until the wet mortar comes to the top, and also smooth the top with a trowel. Keep this cover from the sun and wet it night and morning for a week, until hardened, when it can be easily taken from the box. After it has set for an hour, scratch the word "Top" in large letters in the soft mortar, so it may surely be thus laid on the work, as the slab will have little strength if laid with the embedded metal at the top of the slab. Do not make concrete in freezing weather, or else make it where it can be protected from the frost. Such slabs can be made in Winter, by making them in a warm place free from frost, and storing them for use until they are set and hard. The culvert when completed, and after the slab or flagstone is placed thereon, should be low enough so that it can be covered by the road material which should not be less than six inches in depth, and if the culvert is properly built there will be no expense for maintenance, as in the case with a plank top. No culvert should be built less than two feet in width so that it may be easily kept free from obstructions at all times. The bottom of all culverts should be given sufficient fall to send the water out of them immediately. The bottoms and spaces three or four feet wide, at the inlets and the outlets, should be paved to prevent undermining, using cobble or flat stones set on edges and close together with the joints filled with crushed stone or fine gravel. The side ditches should also be similarly paved where there are long grades of five per cent. and over.

#### **I-Beam on Culverts and Short-Span Bridges.**

For culverts and short-span bridges having a span of less than twenty-five feet, it is usually most economical to use the steel I-beams, cover with flag stone or concrete slabs.

The following table shows the sizes and weights of I-beams

which should be used to insure safety in culverts, when crossed by a ten-ton road roller. The figures in heavy type indicate the economical size to use. The lengths given are the clear spans or distances between the side walls. The I-beams should be long enough to rest a foot on each wall. The space between and outside the I-beams on top of the side walls should be filled with concrete or masonry laid in cement mortar. If care is taken to fill with mortar the joints between the flagstones or concrete slabs, the I-beams will last many years longer than they will if the drainage from the road is allowed to wet and rust them.

TABLE SHOWING SIZES AND WEIGHTS OF I-BEAMS TO BE USED FOR VARIOUS LENGTHS OF SPAN FOR BRIDGES OR CULVERTS, USING STONE OR CONCRETE SLABS.

Depth of I-beam, Inches.	Width of flanges in inches.	Weight of I-beam per foot of length, Pounds.	Thickness of web of I-beam, Inches.	LIMITING LENGTH OF SPANS.	
				I-beams spaced 2 feet between centers.	I-beams spaced 3 feet between centers.
<b>5</b>	<b>3</b>	<b>9 3-4</b>	<b>0.21</b>	<b>4' 6"</b>	<b>3' 6"</b>
5	3 1-8	12 1-4	0.36	5' 0"	4' 0"
5	3 5-16	14 3-4	0.50	5' 6"	4' 0"
<b>6</b>	<b>3 5-16</b>	<b>12 1-4</b>	<b>0.23</b>	<b>6' 6"</b>	<b>5' 0"</b>
6	3 7-16	14 3-4	0.35	7' 0"	5' 6"
6	3 9-16	17 1-4	0.48	7' 6"	6' 0"
<b>7</b>	<b>3 11-16</b>	<b>15</b>	<b>0.25</b>	<b>8' 6"</b>	<b>7' 0"</b>
7	3 3-4	17 1-2	0.35	9' 0"	7' 6"
7	3 7-8	20	0.46	9' 6"	7' 6"
<b>8</b>	<b>4</b>	<b>18</b>	<b>0.27</b>	<b>11' 0"</b>	<b>8' 6"</b>
8	4 1-16	20 1-2	0.36	11' 6"	9' 0"
8	4 3-16	23	0.45	12' 0"	9' 6"
8	4 1-4	25 1-2	0.54	12' 6"	10' 0"
<b>9</b>	<b>4 5-16</b>	<b>21</b>	<b>0.29</b>	<b>13' 6"</b>	<b>11' 0"</b>
9	4 7-16	25	0.41	14' 6"	11' 6"
9	4 5-8	30	0.57	15' 6"	12' 6"
9	4 3-4	35	0.73	16' 6"	13' 6"
<b>10</b>	<b>4 11-16</b>	<b>25</b>	<b>0.31</b>	<b>16' 6"</b>	<b>13' 6"</b>
10	4 13-16	30	0.46	17' 6"	14' 0"
10	4 15-16	35	0.60	18' 6"	15' 0"
10	5 1-8	40	0.75	19' 6"	16' 0"

TABLE SHOWING SIZES AND WEIGHTS OF I-BEAMS — (*Continued*).

Depth of I-beam. Inches.	Width of flanges in inches.	Weight of I-beam per foot of length. Pounds.	Thickness of web of I-beam. Inches.	LIMITING LENGTH OF SPANS.		
				I-beams spaced 2 feet be- tween centers.	I-beams spaced 3 feet be- tween centers.	
<b>12</b>	<b>5</b>	<b>31</b>	<b>1-2</b>	<b>0.35</b>	<b>21' 0"</b>	<b>17' 6"</b>
12	5 1-16	35		0.44	21' 6"	18' 0"
12	5 1-4	40		0.46	22' 6"	19' 0"
<b>15</b>	<b>5 1-2</b>	<b>42</b>		<b>0.41</b>	<b>27' 6"</b>	<b>23' 6"</b>
15	5 9-16	45		0.46	28' 6"	23' 6"
15	5 5-8	50		0.56	29' 6"	24' 6"

### Highway Bridges.

Bridge construction has passed through numerous stages. One of the oldest types of a permanent bridge is the stone arch, brought to perfection by the Romans. Bridges of this character were built in Europe many years ago, and are still in use. Stone arches are still being built in some localities, but concrete and concrete reinforced with steel is the modern method. England was the first to use metal for bridge purposes and metal has been used to a great extent in this country. Cast iron and wrought iron have held a prominent place in such work but has been displaced by the use of structural steel.

The principles involved in the construction of bridges, whether in the case of wooden trusses, steel viaducts, stone or concrete bridges, are being more and more carefully understood. Culverts and short-span bridges, having a span of less than twenty-five feet, generally, can be constructed most economically by the use of concrete and reinforced concrete in conjunction with the use of I-beams to hold the concrete slabs. (See subject-matter, p. —.) Longer spans should, perhaps, be constructed with steel superstructure and concrete bottoms or concrete flooring.

Bridges constructed of timber, or timber in the use of bridges, is temporary, the life of an ordinary wooden bridge rarely exceeding ten years and repairs are needed every year. Steel bridges, it is true, require attention; and to maintain the same, painting, tightening, putting in new rivets must be done frequently, and in a comprehensive manner. The life of a steel bridge has not yet been fully determined as they really have not been erected long

enough to determine their life. At any rate it depends upon the quality and care of the bridge.

In the preparation of plans specifications and estimate by the division engineer, district or county superintendent or in the approval of the same, too much care and good judgment cannot be exercised in seeing that bridges of this character are of sufficient strength and also of good design and are properly finished and erected in matters of detail. A poor steel bridge is dear at any price. Ordinarily members of the town board, town superintendents, and even district and county superintendents cannot be expected to judge as to the quality of the material of which such bridges are constructed, but free of cost to each town the Highway Law provides that proper engineering advice may be had either from the commission or by the division engineer, provided the district or county superintendent is not a practical civil engineer. A practical civil engineer should be able to advise as to the proper form and material for abutments and to provide working plans therefor and to also furnish plans and specifications for the superstructure, which necessarily will create a great saving to the towns of the State in this respect alone. If plans and specifications are prepared by the manufacturers as is sometimes the case and submitted to the district or county superintendent for approval, the district or county superintendent without cost can secure the advice of either the commission or the division engineer as to the dimensions and special requirements of the bridge to be constructed. The commission can approve such plans and specifications either at the office, or cause the same to be done by the division engineer. The weak spots of many bridges are in the connections. When a bridge is being erected the district or county superintendent can see that the specifications are being carried out, and should he need assistance in this respect, he can readily secure the same without cost to his locality.

It will be noticed that because of the fact that plans for bridges must be approved by proper authorities that not only good construction, but good design and beauty must be an element. Much attention should be paid to the appearance of structures of this character, but it is very easy to run to the opposite extreme with

towdry results. It is a very short step from ornamental constructions to constructed ornamentations giving little and very unsatisfactory substitutes for severe simplicity. It should be remembered that they will last for many years and their appearance is therefore a matter deserving due attention in construction.

Concrete is a material which lends itself to easy manipulation and which can be used by moulding it into graceful outline. It is essential to the preservation of steel bridges that they may be kept properly painted. Rust is the chief destructive agency. District and county superintendents and town superintendents must bear in mind that if fully protected from rust, steel bridges would practically last forever. Bridges should be painted at least every five years and oftener in some instances. Before painting steel, the surface should be absolutely free from rust, scale, moisture and grease. Rust must be removed by scraping with steel scrapers, and scale by the use of stiff wire brushes. Rust left beneath the paint will flake off and then the metal is slowly exposed to the destroying action of air and moisture.

It must be remembered that bridge companies rarely exercise sufficient care when erecting bridges to see that the scale is fully removed and that the bridge is properly painted. In painting bridges the face of the steel trusses facing the approaches to the bridge should be painted white to a height of five to seven feet, so as to aid the traveling public in crossing the bridge without accident after night fall. The material commonly used for this purpose is red lead mixed with linseed oil. Bridge floors of plank usually wear out in from two to four years and are a constant matter of expense for renewal and repair. With the increasing price of lumber it is only a matter of time when concrete or some other material must be used for such purposes. All steel bridges now being built should be strong enough to support concrete floors as it is cheaper and more satisfactory to provide for this additional weight than to reinforce the bridge after construction. Concrete adds to the dead weight but this is more than compensated for by the extent to which it distributes the live load.

With plank flooring, the weight of every vehicle passing over it is transmitted to its individual members causing a constant jar and a distribution which is destructive. With concrete the weight

is spread over a greater area of the structure, therefore the injury is much less. It will be seen that if floors of bridges were constructed of concrete it would not be so necessary to restrict the speed of vehicles.

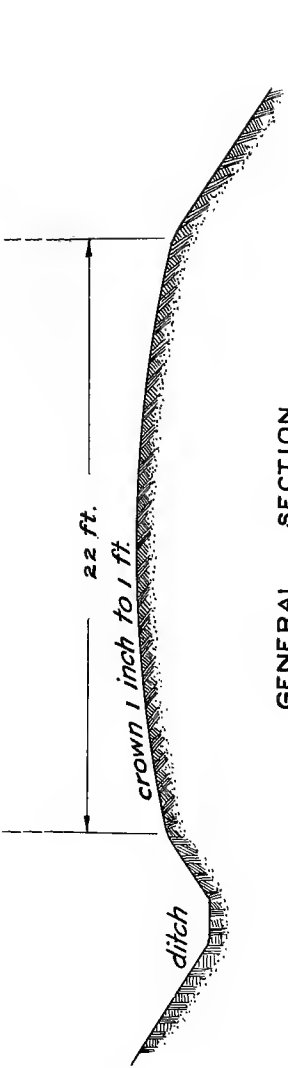
Strength and durability depend upon the proper proportions of all the parts. If doubt exists as to the sufficiency of any plan, it may be submitted to the district or county superintendent, division engineer, or the commission who will carefully examine and report upon it without charge therefor.

A clear width of sixteen feet between steel work is generally recommended except for spans above 150 feet for which the clear width should preferably be eighteen feet, except for villages and towns where the width must be determined by the local conditions.

### Surfacing Earth Roads.

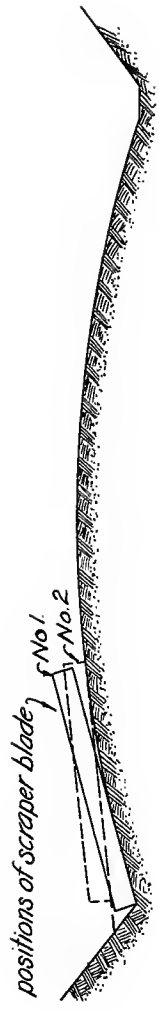
Any road surfacing material should be of the same quality and degree of hardness and durability throughout, so that the surface may wear evenly and remain smooth and free from holes and depressions caused by traffic. *Never under any circumstances place on the surface of the road, sod, roots, any organic material or any worn-out dust or mud scraped from ditches or sides of the road.* After the earth roads have been properly drained, those having the most traffic or the poorest natural surfacing materials should have their surface improved by placing thereon the best available material, not less than eight feet in width and not less than six inches in thickness. When the natural road is of loose sand, this can be much improved by spreading over it a layer of clay or loam and allowing it to mix with the sand. Sawdust is sometimes used with good effect on loose sand. When the natural road is of soft clay, a layer of sand or gravel will stiffen and bind it and much improve it. Crude petroleum oil is used on the sandy roads of California in the rainless regions and produces excellent results.

From the report of the Massachusetts Highway Commission it is learned that experiments of treating a common sand road with a heavy Texas oil containing about sixty-five per cent. of asphalt were made. The road was treated with two applications of this oil and one application the following year and the result was generally satisfactory and the road was in good condition after two



GENERAL SECTION.

dotted line shows proper & improper manner of working road.



It is easily seen that position No. 1. gives better material for finishing





year's use, although according to the report it is stated that better results can be obtained by a change of method. The commission first caused the surface to be shaped by the use of the road machine to a crown of about three-fourths of an inch to the foot. Over this was spread three coatings of oil, two coats the first year, and one coat the next year following. The oil was shipped in a tank equipped with steam pipes for heating it. A small portable steam boiler furnished the heat for the oil in the tank car and the power for dumping it into the cart. The oil was heated to a temperature of 180 degrees Fahrenheit, and spread onto the roadway from a watering cart with a special sprinkler made for the purpose. Each of the first two coats consisted of about three-quarters of a gallon per square yard of road. After the first coat was applied it was allowed to stand two weeks when the second coat was put on. After the second coat was applied, the whole surface of the roadway was chopped up by a disk harrow, rolled with a light horse roller and covered with sand to mix with the free oil. A thin sprinkling of sand was spread over the surface from time to time to mix with the oil that had worked to the surface. In these two applications 13,418 gallons of oil were used. The area covered was 9,335 square yards and the average was 1,437 gallons per square yard. In the latter half of the second year 7,080 gallons of oil were spread on the top of the road and after the oil had been given a chance to soak in, the road was covered with stone screenings and sand, 22.45 tons of stone being used. The stone was placed on the oiled surface and the sand was spread on from time to time to mix with the free oil.

The third application amounted to .758 of a gallon of oil per square yard of road.

The total amount of oil used was 20,498, or 2,195 gallons per square yard. It is safe to presume that the Massachusetts Commission would be very glad to furnish further information relative to this question.

### **The Repair and Construction of Earth Roads.**

The drawings on opposite page show the desirable shapes for earth roads, being the most general shape or section to be used in all kinds of soil except heavy clay or sand. The attention of the

town superintendents is called to the illustrations showing the positions of the scraper-blade to a road machine for grading and scraping. The blade should be handled as illustrated by No. 1 in the third cut, which will give the best material for the new surface of the road. Roads through pure sand can only be improved by adding clay, hardpan, gravel, heavy loam, sawdust, bark, straw or other material, which when decayed forms a binding material or is of a claylike nature, and by resurfacing with some road-making material. Immediately previous to resurfacing is the only time a pure sand road should be crowned, but this does not mean that a pure sand road does not need ditches.

Roads in clay soil should have deeper ditches for the reason that clay retains the water so much longer. A clay road will not readily become soft in the spring if it is built with a deep ditch and wide enough to keep the water down, provided that the crown of the road is maintained. The rut-scrapers should be used as soon as ruts appear after a storm in order to keep the traveled way in proper shape. See illustration preceding this page.

Upon clay roads where deep ditches are necessary precaution should be taken so that vehicles may have room to pass without danger of being upset.

#### **Gravel for Surfacing.**

Gravel should be the best that can be obtained in the vicinity of the road. The fragments of stone should be hard, tough and durable and their size should not exceed one inch in the greatest dimension. The largest stone should be screened out, or raked off after being placed on the road and used in the foundation. Several sizes should be so proportioned that the smaller ones are just sufficient to fill the interstices between the larger ones, and the gravel should contain a sufficient amount of binding material to fill the remaining interstices so as to form one solid, impervious mass. The binding material may consist of clay or loam, which is clay mixed with sand and vegetable matter and has many of the characteristics of clay, sand, stone-dust or some material that is fine enough to fill all the voids and make the finished gravel surface impervious to water when properly drained, crowned and shaped.

The proportion of binding material should not exceed the amount required to fill the interstices; all in excess of this is only

a damage to the road. In general, the binding material should not form more than fifteen or twenty per cent. of the total quantity of the gravel used.

If the gravel as obtained from the pit is deficient in quantity or quality of binding material, a sufficient amount of the proper quality should be added. Should the gravel contain an excessive amount of binding material, the excess should be screened or washed out. After the gravel has been spread to the proper width, thickness and shape, it should be rolled with a steam or horse roller, and if too dry, sprinkle before rolling. Where the only available surface material is shale, only the hardest, toughest and most durable varieties should be used, usually those containing the largest portions of silicea or sand. Argillaceous shales which turn into clay when exposed to the elements under traffic are worthless for road-building purposes and should never be used. After spreading to the proper width, thickness and shape, the surface should be covered with a layer of sand, fine gravel or other proper binding material, and rolled with a steam or horse roller until a smooth, firm surface is obtained.

## MAINTENANCE.

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It is a useless waste of time, money and energy to construct highways of any kind or class, except that a carefully prepared system for the maintenance of the same is devised, and the joint committee were not unmindful of this fact, as will be noticed by the careful perusal of sections 21 and 53 and sections 170 to 179 inclusive, of the Highway Law.

During the last four or five years the authorities not only of this State, but also those of Massachusetts, Connecticut and New Jersey, have been experimenting by using various materials for top-dressing and in the maintenance and repair of improved roads, for the purpose of protecting the road surface and providing for and to overcome the dust nuisance. With the increasing use of the highways by the automobilists it becomes absolutely necessary to adopt plans and to provide means not only in the construction, but in the maintenance, so that the highways may be modernized to the extent that modern requirements may be met so far as possible. That a road must be kept smooth and free from depressions, cannot be too often reiterated. It is therefore absolutely necessary that immediate repairs be commenced as soon as the road has been constructed. No mistake should be made in this particular, as it is of great importance that constant care and attention should be given thereto, to the end that all defects which may appear may be immediately repaired before serious damage is done. After a newly constructed road, either of gravel or macadam, has been opened to the traffic it should be carefully watched in order that any defects may be remedied at once. Shallow ruts and depressions should be repaired without delay, or serious damage will be the result. It is a mistaken idea that when a macadam road (sometimes the same idea prevails in case of a gravel road) has been properly constructed no further work is necessary. In repairing and maintaining a new gravel road, the material on the side of the depressions can be raked back, but after a time it will

be necessary to fill the depressions with new material. In the latter case, the old hardened surface should be slightly loosened in order to get a bond between the old and the new materials. The gravel used should be smaller in size and should also contain more binding material than that used in the construction. In the repair and maintenance of macadam roads it should be remembered as heretofore stated, that "A stitch in time saves nine," and that the work of repair should be commenced as soon as the frost is out of the ground in the Spring.

One of the serious difficulties encountered is "raveling," or the tendency of one stone after another to loosen from the mass and come to the surface. This occurs largely in the Spring when the screenings have become loosened and partly blown off the surface. It also occurs on steep grades after the binding material has been largely washed off by heavy storms. Sprinkling is an effective remedy for raveling, but is impracticable on most country roads at the present time. Loose stones should first be raked into piles on the roadside, then collected into wagons and hauled away. Generally these stones are worthless for patchwork, as the corners have been worn off and rounded, making it difficult to get a bond with them. As a rule only the middle eight feet of either a gravel or macadam road need be covered. The sand to be used on a macadam road should be coarse and reasonably clear, although a small amount of loam is sometimes beneficial in compacting and cementing the surface providing crude petroleum, tar or tarvia, or crushed asphalt rock is not used. Ruts will appear in either a gravel or a macadam road and are caused by heavily-loaded, narrow-tired wagons or by the common habit of tracking or by a combination of both. Ruts are most liable to occur in the Spring or after heavy rains when the road is soft. Sometimes ruts will disappear if the traffic is diverted from one side to the other by the use of barricades for a time. In serious cases it is necessary to either pick down the loosened stone on the sides into the depressions or to fill the ruts with new material.

The former remedy will often give the best results on a new road. If the repairs have been neglected until long ruts or hollows have been formed, constant work will be required. These ruts or depressions should be repaired in short patches, leaving sections of

the unrepaired road in between until the patches have been consolidated by the traffic. This method is advisable, as horses avoid long stretches of stone, and new ruts have a tendency to develop alongside the old ones.

Considerable damage is often done to a macadam road by clay and loam being carried on to the surface at interesections with earth roads. The clay or mud is brought on to the macadam road by the wheels and tends to pick up the stone from the top course, leaving a rough surface. This material is often carried several hundred feet. Where this occurs the mud should be scraped off and a coating of suitable material substituted. It is also advisable to cover the earth roads with gravel or broken stone for a distance of two or three hundred feet from the intersection in order that the undesirable material may be jarred off the wheels before the macadam road is reached. Heaving of the macadam in the Spring as the frost goes out of the ground is caused by a poorly compacted and porous surface which lets the water into and underneath the macadam or by defective drainage. In either case it is absolutely necessary to secure a dry foundation. In extreme cases it may be necessary to lay tile-underdrains as described on page 482, but ordinarily the defects may be remedied by cleaning and deepening the side ditches. It is sometimes effective to lay a line of porous drain tile from the center of the road to the side ditches.

One of the most effective means of keeping a gravel or macadam road in good condition, is a thorough rolling after the Spring thaw. The roadbed at that time is wet and soft and in the most favorable condition for effective rolling. The surface should be kept at all times in such condition that the water can have an unobstructed flow into the side ditches. Small depressions will allow water to stand and should be filled up even with the surrounding surface with a smaller size of gravel or crushed stone. The sides sometimes become covered with an extensive coating of mud or dust which has been carried from the center by traffic or heavy rains. This material holds the water and prevents its reaching the ditches quickly. The ditches or culverts should be kept free from obstructions at all times. All weeds or grass on the shoulders and ditches should be cut and removed as provided for by section 47, subdivision 4, and section 53 of the Highway Law.

Snow and ice must be removed from the culverts as provided for by law. On steep grades during the Spring thaw the water has a tendency to flow down the wheeltracks made in the snow and ice and is apt to wash down to the surface and carry away the binding material. This water can easily be diverted to the side ditches.

The most common injury to highways is the picking by the calks of horses' shoes and the constant pounding of the iron and the suction caused by swiftly-moving vehicles, which tend to loosen the binding material, which is quickly blown and washed away by the rain. In extremely dry weather the high winds or suction caused by the speed of swiftly-moving motor vehicles, will remove the binding material from the surface and from between the fragments of stone in the top course. The amount of wear varies in accordance with the character and kind of material used and the amount of traffic to which the road is subjected, and also to climatic changes. It has been demonstrated that about twenty per cent. of the wear is due to climatic changes, about eighty per cent. to traffic, and about four-tenths of the latter cause is due to horses' feet, and six-tenths to the wheels, including the wheels of automobiles with chains, and the suction caused by the excessive speed of such vehicles.

#### Materials.

Available material for either the construction or the maintenance of macadam roads in the northern and eastern portions of New York State, is far superior to that which is available in the southern part of the State. Such material in the southern part of the State, generally speaking, is nothing more or less than ordinary sandstone, and it has been demonstrated that such material is unsatisfactory, as roads constructed therewith will not stand the heavy traffic. Ordinarily, it has been the practice in this State to construct the top or the wearing course by the use of trap rock or limestone shipped to local points at a distance of from fifty to two hundred miles. Taking into consideration the cost in transportation of such material, either by water or rail, unloading the same from cars, and transporting it by teams to the road under construction, it would seem to cause an expense so great that some means or plans should be adopted so that, in

lieu of this expensive material, local material can be substituted. Because of this fact it has been demonstrated by the authorities of this and other States that a road surface can be protected from climatic changes, calks of horses' shoes, pounding of the iron, and the suction of swiftly moving vehicles, by the use of crude petroleum, tar or tarvia, or crushed asphalt rock. If, as stated, the surface can be protected by the use of such materials, almost any kind of local stone may successfully be used in construction.

### How to Construct.

In order that crude petroleum, tar or tarvia, or crushed asphalt rock may be used advantageously on a macadamized road, it will be necessary to bear in mind the following facts, viz.: the sub-grade must be brought to an even surface parallel with the grade proposed, after the same has been macadamized, by making necessary excavation or embankment. Soft or spongy earth or other material, not affording a firm foundation, must be removed and properly prepared. The sub-grade surface must then be compacted by the use of a steam roller. When the rolling shall have been done, the surface of the sub-grade must be dry and smooth and seven or eight inches below the proposed finish.

Upon the sub-grade thus prepared must be spread an even layer of stone of sufficient strength so that it will withstand the use of the steam roller. These stones should be broken into fragments so that the largest stone will not be greater at its greatest length than three inches. This layer of stone, after the same shall have been rolled, should be four inches thick and its surface should be parallel with the finished contour of the roadway and at least two inches below the same. This layer of stone should contain an even and uniform amount of binding material so that it may be thoroughly compacted when rolled. Upon the layer of stone, as above described, there should be placed a layer of stone broken into fragments so that the largest stone will not be greater at its greatest length than one and one-half inches.

This last layer of crushed stone, after being uniformly spread, should then be rolled and after rolling should not be less than two inches thick. Providing that crude petroleum, tar or tarvia is to be used to protect the wearing surface after this layer of stone has



been thoroughly rolled, and compacted, screenings should then be spread and brushed into the interstices and manipulated by the use of brooms, water from the sprinkling cart, and the steam roller until all interstices are thoroughly filled, and a wave of grout is shown ahead of the steam roller when in motion. Providing crushed rock asphalt is to be used when this layer of stone is in place, and thoroughly compacted by the use of the steam roller the crushed rock asphalt should then be spread and raked so that the interstices may be thoroughly filled with the same, and the surface is thoroughly hard and even and entirely covered with the same, and the work should be done in dry, warm weather with the temperature showing at not less than seventy degrees Fahrenheit. If the surface be damp or moist from any cause it should not be rolled until the sun has thoroughly dried the same. Whenever after one or more rollings it is found that the crushed rock asphalt sticks to the roller the surface should then be dusted with hydraulic cement to prevent the same. If the surface of the road is to be protected by the use of tar or tarvia after the road surface has been thoroughly rolled, and the interstices thoroughly filled as above described, the tar or tarvia must then be heated from 180 to 200 degrees Fahrenheit, and then poured on the surface of the road by hand or through a hose in as thin a coating as possible, and evenly spread over all the surface with brooms. After it has been dried it should be allowed to set for from two to five hours or even more, after which crushed stone screenings which have passed through a half inch screen should be spread evenly over the surface. The road can then be thrown open to traffic, it is not necessary to use either a horse or steam roller, but the traffic should be thrown from one side to the other by the use of a barricade so that screenings may be pounded to place. As the road is being used by traffic, fresh screenings should be spread on all spots where the tar or tarvia has worked through. The cost of this treatment on a new road is from \$350 to \$400 per mile. A road repaired or constructed by its use has the appearance of an original asphalt pavement but is pliable and elastic, being of sufficient thickness to protect the wearing surface from the calks of horses' shoes and the wheels of vehicles. At the same time it does away with the dust nuisance, deadens the noise and is not injured by automobiles ex-

cepting where chains are used on the rear wheels. If crude petroleum is to be used the macadam road should be surfaced with at least an inch of stone screenings after the top or wearing surface has been thoroughly rolled and the interstices thoroughly filled by the use of the sprinkling cart and steam roller, then the crude petroleum should be sprinkled on the surface of the road and allowed to dry under the sun for a length of time varying according to the temperature.

Section 170 of the Highway Law provides that the maintenance and repair of State and county highways shall be under the direct supervision and control of the commission and that they shall be responsible therefor. That they shall have power to adopt rules and regulations for the guidance of the town, and district or county superintendents, but in case the commission is unable to secure the proper performance of work from such official, they have the power to contract for any necessary repair and likewise to provide for the due supervision of the work.

They have the power to purchase the materials for maintenance and repair and to cause the same to be delivered at convenient intervals along the highways. They also have the power to establish a system of patrol so that the highway shall be under constant observation and be effectively and economically preserved, maintained and repaired.

The town superintendent should appreciate the fact that work of this character can be more economically and more satisfactorily performed under his supervision. It therefore should be his aim to carefully inform himself so that his services may not only be valuable to his town in the improvement and repair of the town roads, but also to the State in the maintenance of State and county highways.

The suggestions and information which have been given are for the purpose of furnishing information for the guidance of those officials whose duty by law is the proper repair and maintenance of the public highways, and the town superintendent who is careful to observe the same will find that he is not dependent upon any party or even upon the vote of his town for a position or place of employment. Intelligent and systematic work on the part of such an official will and must necessarily be appreciated by the commission.

To maintain a road it must receive constant care and attention, and be regularly inspected as often as once every two weeks.

All loose stone or organic matter should be raked into piles, and collected into wagons and hauled away. The loose stones should be piled in some convenient place for future use in accordance with directions.

All ruts, holes and depressions should be filled with broken stone of the best quality available, and equal to that used in constructing the original wearing surface or top course. The size of the stone should be that which is usually called three-quarter inch or such a size as will pass through a ring one inch in diameter. Great care must be taken to fill these holes, ruts and depressions a little above the old surface so that there will be no depressions after the stone has become properly consolidated.

When the ruts, holes and depressions are too frequent to justify repair to each defect by patching, the whole macadam surface, or at least a strip eight or twelve feet wide in the center of the road, should be resurfaced by a layer of broken stone of the best quality available, trap rock, cyanite, granite, hard hornblende, gneiss or limestone being preferred. This material should be spread over the area to be resurfaced, the thickness of the same being from one inch to three inches, or enough to restore the original surface of the road to a proper crown and shape.

This work should be done in the early Spring or late Fall, so that the Spring and Fall rains will help to consolidate and bind the stone. Provided that a steam roller is available, the stone should then be rolled until they do not creep or weave, then covered with dry screenings and thoroughly saturated with water at the time the rolling is in progress. Screenings sufficient to fill all the voids should be brushed in and rolled dry, after which the road should be sprinkled until saturated, the sprinkling being followed by the roller; more screenings should be added if necessary, and the sweeping, sprinkling and rolling should continue until a grout has been formed of the screenings, stone-dust and water that should fill all the voids and should form a wave before the wheel of the roller.

After the wave of the grout has been produced over the whole section of the road, this portion of the road should be left to dry, after which it should be open to travel. Should a steam roller be

not available, the traffic will gradually bind the stone, but great care should be taken during this time to prevent ruts being formed, and to preserve the crown and shape of the road. Ruts and depressions whenever formed should be immediately filled; the best way to do this is to rake loose stones into them and place barricades so as to divert the traffic from one side of the road to the other.

A wearing course from one-half to one inch in thickness should be constantly kept on the road, and all portions of a road surfaced with gravel or crushed stone between the surfacing material and the ditches or gutter, or in other words the shoulders, should be kept clear of all accumulations which have been carried from the center over by traffic or by heavy rains. Snow and ice must be removed from the culverts and waterways, and water should never be allowed to follow the wheel tracks, and the crown of the road must be preserved. A constant supply of gravel or broken stone should be placed in piles by the side of the road at convenient intervals. All highways approaching an improved road should be graveled from a distance of 150 to 200 feet to prevent the mud from the earth road being carried on to it.

A system of constant care and attention is the adopted plan in Europe, but more particularly in France, while in the States which have been improving their roads by State aid the general plan has been to repair the roads frequently, therefore there seems to be two systems — continuous maintenance and periodic repairs. Continuous maintenance is the plan adopted in France, and is commonly called the patrol system, which is provided for by the provisions of section 170, subdivision 3, of the Highway Law. By this plan, the waste is supplied as it is worn off, by filling depressions, and by adding patches here and there, and as a result the full thickness of the road is constantly maintained. The system of periodic repair permits the road to wear thin, and as a result a uniform new surface must be added. The patrol system properly organized gives a constantly good road, while a road repaired by the periodic system is seldom good, and is bad just after repair, becoming impassable, and then deteriorating again until attention is again required.

It is reasonable to presume that maintenance by the patrol system is the cheapest in the long run.

## STEAM OR OTHER POWER.

The use of a steam traction engine or a power roller in lieu of teams for grading and scraping a highway may be wise.

On a basis of cost of \$4 per day for one team and driver and \$1.50 per day for labor, the total cost per day would be as follows:

Four teams, at \$4 per day.....	\$16 00
Two laborers on machines, at \$1.50 per day.....	3 00
Four laborers following machine, at \$1.50 per day....	6 00
	<hr/>
Total . . . . .	\$25 00
	<hr/> <hr/>

If it is necessary for the town to rent a traction engine or power roller the cost per day for operating it would be as follows:

Rental per day, including engineer's services.....	\$9 00
Fuel . . . . .	1 00
Four laborers following machine, at \$1.50 per day....	6 00
One team with wagon, drag or harrow . . . . .	4 00
	<hr/>
Total . . . . .	\$20 00
	<hr/> <hr/>

The above tables are prepared at an estimated cost for team work of \$4 per day, and \$1.50 per day for labor. This is purely an estimate and these figures should not be taken as a basis for the price of either team or labor as these vary in different localities.

In the improvement, repair and maintenance of the public highways of a town, there are usually many miles of road that require little or no attention with the exception of the removal of loose stone from the beaten track, the smoothing of the surface and the filling of ruts and depressions.

Therefore a single equipment as above described should be able to go over and crown an average of from two to three miles of highway each working day, at a cost of from \$8 to \$12.50 per mile.

## DRAGS AND RUT-SCRAPERS.

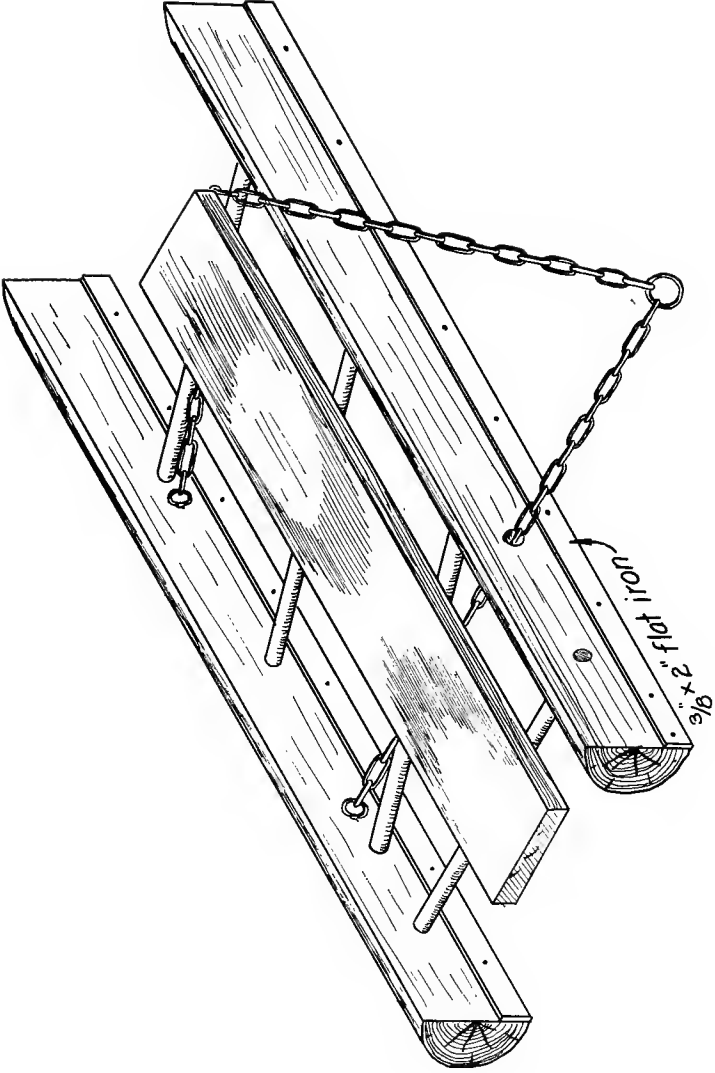
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In the maintenance and care of the ordinary earth road many difficulties are encountered because of the want of a perfect understanding as to how to secure the hardest and most durable surface with the most available material. It has been found that an ordinary earth road can be transformed into a well rounded, well drained public highway, and maintained at a minimum expense by the use of drags and rut-scrapers for smoothing and crowning the traveled portions.

The highways can be maintained by the use of these drags and rut-scrapers at an expense of about two dollars and a half per mile, at the same time transforming muddy uneven roads into thoroughfares which are smooth and free from ruts and depressions. Before undertaking to use the drags and rut-scrapers the road must be thoroughly drained, shaped and crowned by the use of a road machine for grading and scraping. The loose stones, sod and organic matter must be removed and the ditches and culvert free and clear. Then the drags and rut-scrapers must be used while the road is wet from recent rains, and should be dragged its entire length.

It has been very difficult to impress upon the minds of those having care of the earth roads the advantage to be derived from the use of drags and rut-scrapers. It seems that the hardest part is in making the start, the rest is so simple that one will learn by doing it. It will soon be found that the effect will be the smoothing of the road surface, and after this is done the rain and snow water will flow off and encourage the distribution of travel. Teams usually follow the beaten track. This method destroys the old track, and the new one becomes broader and less definite than before.

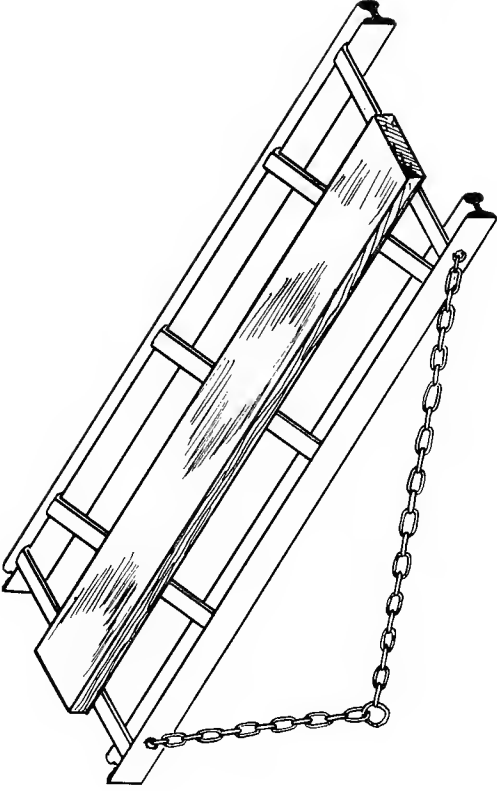
By using these drags and rut-scrapers while the road is yet moist it finally becomes a series of practically water-proof layers of puddled earth, and almost imperceptibly the center is elevated to a smooth grade that is not easily affected by the bad weather.



**SPLIT LOG DRAG .**

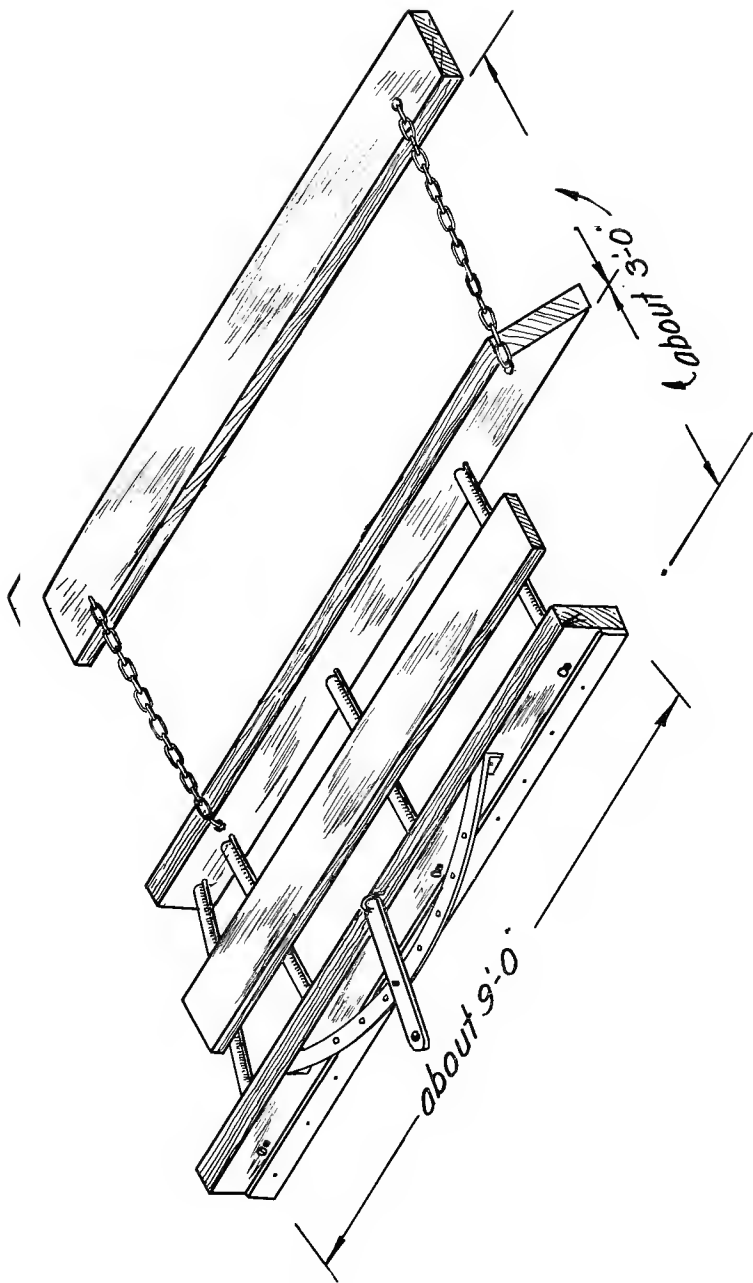






**RAIL ROAD RAIL DRAG.**





**OAK PLANK DRAG.**



These implements should be used when parts of the road might seem altogether too wet, but usually it is impossible to commence this work too soon after a rain. While the road is in this condition it is better to drive down one wheel track and back on the other. This will work the dirt toward the center of the wagon track, fill the depressions and gradually widen the road as the work progresses. Do not be in a hurry. First, provide yourself with an implement of this kind, and second, use it every time possible to improve the surface of the road. Remember that the right time is just as the road is drying after a rain, or when it is thawed on top during the winter and spring. If these suggestions are followed it will be noticed that a surface will be produced and that the road will shed the rain instead of absorbing it, and the reason why the road should be dragged following a rain is so that the road will be prepared to shed the water that it may receive from the next rain.

Rut-scrapers of various designs are used in many places. Town superintendents should make arrangements with men in different parts of the town to do this work. One man and a team can usually cover from eight to twelve miles in a day.

Town superintendents will find that they cannot keep their roads in a condition demanded by the taxpayers of the town, in any other manner at as small an expense.

A split-log drag is made by splitting a log eight or nine feet in length, and ten to twelve inches in diameter in halves, which parts are placed about thirty to thirty-six inches apart, with the flat sides to the front so that the sharp edges will act as scrapers, and be fastened in this position by crossbars. These drags can be constructed at a cost of about two or three dollars each.

Two pieces of railroad rails fastened by iron bars in the same manner would make a better and more durable drag. Plank may be placed on crossbars on which the driver may ride, if necessary. To use it the horses are hitched so that the drag or scraper shall have a slant of about 45 degrees to the direction of the pull of the team.

A still better and more effective drag is made of oak plank, four inches thick and ten inches wide, faced with a cutting edge of steel or iron, and beveled on the back. A heavy stick of timber

to smooth and compact the road may be fastened to the back by means of chain about thirty inches in length. The drag is hauled by a tongue fastened to the front portion by means of eye bolts and a half circle of flat iron fastened rigidly to the face of the plank. There are several holes through this half circle spaced at equal distances, and in a position to receive a bolt passing through the tongue. By changing this bolt any desired slant may be given to the scraper.

Town superintendents should appreciate the fact that earth roads will not maintain themselves and remain in good condition. Even though they are properly built they require careful and frequent attention, without which they rut up, forming water-pockets which holds the water, when as a matter of fact the water should be carried to the ditches on either side. Roads in which water pockets are allowed to form soon become impassable after heavy rains, and particularly in the spring when the frost goes out of the ground they become very rough. Therefore constant care and attention should be directed toward keeping the road smooth and hard, and in maintaining or increasing the crown.

The following points are to be borne in mind:

Make a drag which can be hauled over the road at an angle so that a small amount of the earth is pushed to the center of the road.

Drive a team at a walk, and let the driver ride on the drag.

Begin at one side of the road or wheel track, returning on the opposite side.

Drag the road as soon after every rain as possible but not when the mud is in such a condition as to stick to the drag. Do not drag a road when dry.

Drag whenever possible at all seasons of the year. If a road is dragged immediately before a cool spell it will freeze in a smooth condition.

The width of the traveled way to be maintained by the drag should be from eighteen to twenty-four feet; first drag a little more than the width of a single wheel track, then gradually increase until the desired width is obtained.

Always drag a little earth toward the center of the road until it is raised, forming a crown of at least one inch fall to the foot. If the drag cuts in, shorten the hitch.

The amount of the earth that the drag will carry along can be very considerably controlled by the driver accordingly. When the roads are first dragged after a very muddy spell the wagon should drive if possible to one side until the roadway has a chance to freeze or partially dry out.

The best results from dragging are obtained by a repeated application. Constant attention is necessary in order to maintain an earth road in its best condition.

## REMOVAL OF OBSTRUCTIONS WITHIN THE BOUNDS OF HIGHWAYS.

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The public highways of the State were laid out in order to facilitate transportation, and the traveling public have the right to their use in their entirety. Section 52 of the Highway Law clearly defines obstructions, such as trees which have been cut or have fallen; limbs of trees which have fallen, or branches of the same overhanging the highway so as to interfere with public travel therein; lumber, wood, or logs piled in the highway; machines, vehicles and implements abandoned or habitually placed therein; fences, buildings or other structures erected within the bounds of the highway; earth, stone or other material placed in any ditch or waterway; telephone, telegraph, trolley and other poles, and wires connected therewith, erected within the bounds of the highway so as to interfere with the use of the same.

Wherever obstructions are found, it is the duty of the town superintendents to serve a thirty days' notice upon the owner or occupant. For form of notice the town superintendent may use Form No. 12, p. 75.

Thirty days after the service of a notice, the town superintendent should promptly proceed to remove or cause the removal of the obstructions. The expense thereby incurred must be paid out of moneys levied and collected, and available therefor as provided by section 90, subdivision 4, and section 91 of the Highway Law.

It is not the intent of the law to clothe the town superintendent with the authority to destroy property or to unwarrantably interfere with the rights of corporations in the conduct of their business. In case poles or wires connected therewith should constitute obstructions, the town superintendent, after the expiration of the thirty days, should hire labor, and proceed to reset poles, being careful not to cut or break the wires connected therewith. If it becomes necessary to do so, the town superintendent should employ an expert, and would be warranted in so doing, so that he would



be able to show that so far as possible the vested rights of such corporations had been protected and cared for. As heretofore stated, the expense is first paid by the town, but the amount thereof is charged against such owner or occupant, and levied and collected as provided by section 55 of the Highway Law, thus reimbursing the town for any moneys that may have been expended in the performance of such duty.

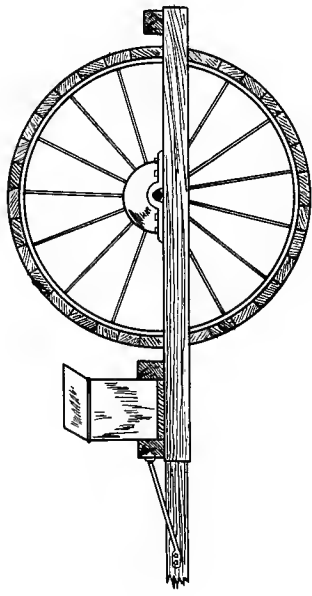
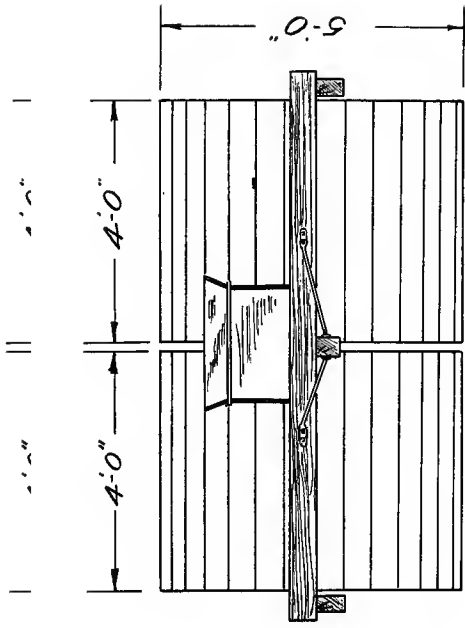
The Attorney-General, in an opinion under date of September 8, 1904, concluded that if the telephone poles stand in such portions of the highway as are needed for highway purposes, and so as to obstruct public travel, the highway commissioners (town superintendents) may and should, by written notices served upon the owners thereof, direct their removal, and in the event of the failure of their owner to remove them, the highway commissioners (town superintendents) may of their own motion summarily remove them.

The public is entitled to the streets or highways in the condition in which they were placed, and whoever without special authority materially obstructs or renders hazardous their use, by doing anything upon, above or below the surface is guilty of maintaining a nuisance. It is a nuisance to place logs in a highway where they are not needed for repairing or improving it, even if they are placed at the sides of the traveled path. The public is not confined to the traveled portions of the highway. The town superintendent must not allow his machinery and implements to remain within the bounds of the public highway, except during the time when such machinery and implements are being used for the repair and maintenance thereof.

#### Obstructions Caused by Snow.

The supervisor, town board and town superintendent should thoroughly understand that none of the money which under the provisions of section 90, subdivision 1 and sections 91, 100 and 103, is placed in the hands of the supervisor subject to an order of the town superintendent, shall be used for the removal of obstructions caused by snow. The town superintendent in his statement as provided for by section 90, subdivision 4, should include the

amount which in his judgment will be necessary for such purposes, and if it is found that such amount is insufficient, section 92 provides for an additional amount. The town superintendent may make arrangements by the selection of a person or persons in parts or sections for the specific purpose of the prevention and the removal of obstructions caused by snow, to the end that the locality may speedily receive prompt relief. It will be noticed that the highway law does not provide for the assessment of labor, therefore the removal of obstructions of this character must be on a money basis.



SNOW ROLLER.



## ROLLING SNOW.

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In the northern counties of this State it has been the practice in many instances to roll the snow. This method has been highly successful. It has also been the practice in Wisconsin, Michigan, Vermont and other states to roll snow, and the system has been so general in some localities that manufacturers of road machinery are advertising and putting on the market, rollers for this specific purpose. The practice of rolling snow has been in vogue in Vermont for about seventeen years, and is now almost universal, particularly in the eastern half of the State.

The advantage over methods of removing snow is that a hard, wide, level track is made, which permits teams to pass one another without danger or inconvenience, the snow being compacted for a width of eight or ten feet, and it is therefore smooth on either side of the beaten paths. As no snow is removed from the road by shoveling and piling the same on the sides, loose snow does not blow into these paths and fill them. When new snow strikes this smooth, rolled surface it is easily blown away and gives little or no trouble. The sleighing remains good as long as there is any snow in that vicinity. When snow is melting off in the Spring little inconvenience is experienced, as the beaten track remains compact and hard, and therefore, will sustain the traffic until ground is reached.

Snow rollers should be from five to five and a half feet in diameter, built in two sections of from four feet to five feet, six inches in length, with as little space as possible between these two sections. A roller should be constructed of two sections of such length as will permit it to pass readily within the rails of bridges in the town. Many rollers are built with a snub pole which is attached to a bob-sleigh, and to which from four to six horses or cattle are hitched. The first rolling should take place as soon as a depth of from six to eight inches of snow has accumulated upon the

surface of the road and again upon the accumulation of every additional six to eight inches.

Where drifts are encountered the snow should be leveled before the roller is drawn over it, thus keeping an even surface.

There should be a roller to each twenty-five or thirty miles of road in a town. The cost of rolling is from twenty-five to fifty cents per mile.

Complaints have been made that the snow is blown from roads which have been improved by stone and gravel, leaving them bare in spots. The rolling of these roads as soon as the snow has accumulated on the surface, will pack the same and retain it upon the surface.

After investigating the conditions in Vermont, New Hampshire and Maine, it was learned that it requires a severe snow storm to make the cost of rolling the roads more than one dollar per mile, and in ordinary storms it is reported that roads can be opened at an average expense of about sixty cents per mile.

The average snowfall in these sections each winter for twelve years was nine feet. It is reported that where roads are rolled within two days after a bad storm, they are good, and that loaded teams can readily pass.

Snow rollers have been in use in various sections of those states for many years, and the citizens of the towns seem to be unanimous in the opinion that they get better roads with less expense than in any other way. It is claimed by some that four horses will haul one of these rollers in twenty-four inches of snow.

## WIDE TIRES.

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One of the most important factors, associated with the subject of the improvement, maintenance and repair of the public thoroughfares, is the width of wagon tires and the shape and size of the wheels. A vast amount of the present wear and injury to the public thoroughfares could be avoided provided that wide instead of narrow tires be required on wagons designed to carry heavy loads.

Narrow tires have a much more injurious effect upon a road than wide tires, because, in the latter case, there is a distribution of weight over a greater bearing surface and the pressure, per square inch upon the surface, is reduced. Wide tires do not readily cut into the roadway and form ruts. A loaded wagon, with two-inch tires to support the load, wagon and all, would have twice the weight over the bearing surface, than though the tires of the wagon were four inches wide.

In governing the use of wagons with wide tires and in the manufacture and purchase of such wagons, consideration should be given not merely to the strength of the wagon and its loads, but also to the strength of the road to be traveled. Wide tires do not as readily cut into the roadway and form ruts. They act as rollers and tend to compact the roadway. Narrow tires are road destroyers. Wide tires are road builders.

Small wheels are also much more injurious than large ones, because the greater the diameter the less will be the resistance. It is also well to state that vehicles with springs have a much less injurious effect upon a roadway.

As to the desirability of the use of wide tires there can be no question. The most casual observation will suffice to convince any one of the damage of a heavily laden wagon equipped with the ordinary narrow, sharp, rounded tires will produce. There is also another, and perhaps even greater advantage to be gained by their use, namely, the increased hauling capacity attained. Tests

have been made, from time to time, of the effect, not merely on the road, but also on the pull or power required to move the load.

A very interesting bulletin (No. 12) has been issued by the United States Department of Agriculture, giving a synopsis of the laws of various states in the Union and in foreign countries in relation to the use of wide tires, together with detailed descriptions of thorough tests which have been made and the results thereof. These tests prove conclusively the advantage of wide tires to the general public, as a road improver, and to the individual users as a money saver. It requires no complicated mathematics to figure out the benefits derived from the use of a vehicle capable of carrying on macadam roads 2,500 pounds as against 2,000 pounds; on gravel roads, 2,482 pounds as against 2,000 pounds, and on dry dirt roads, 2,500 pounds as against 2,000 pounds; while on clay roads, with deep mud, slightly dry on top, a large number of tests showed an average of 3,200 pounds for the wide tired vehicles as against 2,000 pounds for the narrow tired.

An instructive paper (Bulletin No. 39), issued by the Agricultural Experiment Station of the University of the State of Missouri, at Columbia, Mo., contains a very exhaustive discussion of the influence of the width of tires on draft of wagon, with details of tests in all descriptions of roads, on meadows, pastures, stubble and plowed lands, with cuts showing the roads as they appeared after the tests were made, and giving as a conclusion an advantage varying with different conditions of from seventeen to one hundred and twenty per cent. in favor of wide tires.

Of the many tests which have been made to establish the claims in favor of wide tires as against the narrow ones, a few of the results are given as stated in Bulletin 12 of the United States Department of Agriculture, by General Roy Stone. In Utah, at the experiment station, it was shown that a given load on one and one-half inch tire, pulled forty per cent. heavier than when on a three-inch tire, the test being made on grass sod. On a moist, but hard road, the percentage was twelve and seven-tenths in favor of the three-inch tire. In Ohio, a wide tire test was made in the State University. An ordinary wagon, with a new three-inch tire, was loaded with two long tons (4,480 pounds) and the draft



measured by a dynamometer. On an ordinary earth road, in good condition and hard, the draft was two hundred and fifty-four pounds. On a grass field it was four hundred and sixty-eight pounds. On a newly plowed field it was seven hundred and seventy-one pounds. As one hundred and fifty pounds is the draft of an ordinary horse of one thousand pounds, two horses could draw this load with ease on an ordinary road, and a ton and one-half on a grass sod; while with a narrow tire one-half as much, or a single ton, is a full load for a double team. Besides this, the broad tires roll and level the road so that the more they are used the better the road becomes, while narrow tires cut it into ruts.

Professor Sanborn, of the Missouri Agricultural College tried the same experiment with wagons having tires of different widths, using a Baldwin dynamometer. The weight of the loads drawn was three thousand six hundred and sixty-five pounds each. The tires were one and a half inches and three inches, respectively. The tests were made on blue grass sod partially moist. The draft of the wide tires averaged, for level ground, three hundred and ten pounds. For the narrow tires the draft was four hundred and thirty-nine pounds or forty-one and six hundredths per cent. more than the wide tires. Assuming the wagon to weigh one thousand pounds, then on the broad tire three thousand and two hundred and forty-eight pounds would be drawn as easily as two thousand pounds on the narrow tires. Again the broad wheels in the trial did not injure the turf, while the narrow wheels cut through it.

It will be seen, therefore, that the wide tires are not only lighter in their draft than narrow ones, under nearly all conditions, but that they cut up the road very little; in fact, when four inches wide, they tend to make the road continually better.

That this subject has had the closest attention paid to it in Europe is proven by the regulations adopted in the various countries as reported by the United States consuls.

. In Austria, all wagons built for a load of more than two and one-fourth tons must have wheels with rims at least four and one-third inches wide (Styria and Carinthia), and if built for more than four and one-half tons (in Styria), or more than three and

one-half tons (in Carinthia), the rims must be at least six and one-fourth inches broad. In lower Austria a width of rim of four and one-half inches is required for loaded wagons drawn by two or three horses. In Bohemia the same regulation applies.

In France every freight and market wagon is a road maker. The tires are from three to ten inches in width, usually from four to six. With a few four-wheeled vehicles used, the tires are rarely less than six inches in width and the rear axle is about fourteen inches longer than the fore axle, so that the rear or hind wheels run about one inch outside of the level rolled by the front wheels.

In Germany the rule prescribes that all wagons drawing heavy loads, such as coal, brick, earth, stone, etc., must have tires at least four inches wide.

By carefully noting these regulations one will see that the European countries have long ago discarded the narrow tires, much to the advantage of their roads and the saving of their horses and vehicles; and it is to be hoped that the American farmer, after digesting these statements, will see the advantage of such a self-evident proposition and follow their example.

Section 22 of the Highway Law prescribes that the commission may make rules and regulations prescribing the width of tires to be used on State and county highways and that any disobedience thereof shall be punishable by a fine of not less than ten and not more than one hundred dollars. Therefore, the attention of manufacturers, dealers and those who are about to purchase new wagons is called to this fact, that they may be able to provide for this contingency. Owners of wagons should appreciate the fact that heavily loaded wagons with narrow tires will not be permitted to use the improved highways built by the State or jointly by the State, county and town. And even though, at the present time, there may be but very few miles of such roads in a town, or county, it certainly would not be advisable to be excluded from the use of such roads.

It must not be contended that wide tires come in contact with more loose stones than wagons with narrow tires because of the fact that section 47, subdivision 6, provides that the town superintendent should cause the loose stone lying in the beaten track

of every highway to be removed, and such an officer of a town should so organize his forces that he may be able to keep the surface of all roads smooth and free from ruts and depressions.

In cases where the town superintendent is negligent in this particular, it not only is the right, but the duty of the users of the public thoroughfares to inform the commission of such fact without delay.



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